Supreme Court, U.S.
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No._____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1998

ELEANOR SCHULER,

Petitioner,

vs.

THE MCGRAW-HILL COMPANIES, INC., including BUSINESS WEEK, an unincorporated division or subsidiary of THE MCGRAW-HILL COMPANIES, INC., a New York Corporation, BUSINESS WEEK ONLINE, GARY WEISS, individually and as employee of THE MCGRAW-HILL COMPANIES, INC., and MICHAEL SCHROEDER, individually and as employee of THE MCGRAW-HILL COMPANIES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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182 PP

QUESTIONS PRESENTED

1. Is an American Citizen's right to protect her reputation entitled to equal protection of the law as against media attacks?

2. Can a trial court deny a citizen's right to and demand for a jury trial and determine matters of fact, innuendo, insinuation, and malice, which clearly are within the purview of the jury to decide?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Petitioner is associated with the following entities: Printron, Inc. and it's subsidiary Heartbeat Medical Corporation.

Respondents listed the following entities and subsidiaries in its corporate disclosure statement: The McGraw-Hill Companies, Inc.; CM Research, Inc.; Capital Radio Engineering Institute, Inc. (National Radio Institute); Computer and Communications Information Group, Inc.; DRI Europe Inc.; International Advertising/McGraw-Hill, Inc.; J. J. Kenny Company, Inc. (J.J. Kenny Drake, Inc. & Kenny Services, Inc. & Liberty Brokerage Investment Corp.); McGraw-Hill Broadcasting Company, Inc.; McGraw-Hill Capital Corporation; McGraw-Hill Capital, Inc. (International Valuation Services, Inc.); McGraw-Hill financial Publications, Inc.; McGraw-Hill Interamericana, Inc.; McGraw-Hill International Enterprises, Inc. (McGraw-Hill Korea, Inc. & McGraw-Hill (Malaysia) Sdn.Bhd); McGraw-Hill New Bureaus, Inc.; McGraw-Hill Publications Overseas Corporation; McGraw-Hill; McGraw-Hill Real Estate, Inc.; McGraw-Hill World University, Inc.; MMS International; Money Market Directories, Inc.; Rock-McGraw, Inc.; S&P ComStock, Inc.; Standard & Poor's International Ratings, Ltd.;Standard & Poor's Investment Advisory Services, Inc.; Standard & Poor's Ltd. (Fund Research Limited); Standard & Poor's Securities, Inc.; Tower Group International, Inc. (Tower Group International Canada Inc.); Columbia Administration Software Publishing Corporation; editora McGraw-Hill de Portugal, Ltda.; Editorial Interamericana, S.A.; Editoriales Pedagogicas Associadas, S.A.; McGraw-Hill Book Company Australia Pty. Limited (McGraw-Hill Book Company New Zealand, Pty. Limited & Standard & Poor's (Australia) Pty. Limited); McGraw-Hill Data Services -Ireland, Ltd.; McGraw-

Hill Holdings (U.K.) Limited (McGraw-Hill International (U.K.) Limited: McGraw-Hill Information Systems Company of Canada Limited; McGraw-Hill/Interamericana de Chile Limitada; McGraw-Hill/Interamericana de Espana, S.A. (Standard & Poor's Espana, S.A.); McGraw-Hill/Interamericana de Venezuela S.A.; McGraw-Hill/Interamericana Editores, S.A. de C.V. (Ediciones Pedagogicas, S.A. de C.V.); McGraw-Hill /Interamericans S.A. (Editora McGraw-Hill de Espana S.A.); McGraw-Hill Libri Italia; McGraw-Hill Ryerson Limited; Medical China Publishing Limited; MHFSCO, Ltd; Science Research Associates, Pty., Ltd.; Science Research Associates, Limited; Standard & Poor's ADEF; Standard & Poor's International, S.A.; Standard & Poor's AB; Standard & Poor's S.A. de C.V.; Tata McGraw-Hill Publishing Company Private Limited.

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Petitioner Eleanor Schuler respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in *Schuler v. McGraw-Hill Companies, Inc., et. al.*, No. 97-2225, was not published, but can be found in Petitioner's Appendix (Appendix), pp.3-7. The opinion of the United States District Court for the District of New Mexico in *Schuler v. McGraw-Hill Companies, Inc., et. al.*, CIV No. 96-0292 SC/RLP also was not published, but can be found in Petitioner's Appendix pages 10-34.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) was entered on April 22, 1998. (App. at 3-7). The Tenth Circuit denied a timely petition for rehearing on May 27, 1998. (App. at 8-9). This Court has jurisdiction of this matter under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment XIV, Section 1 states in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

> of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The United States Constitution, Amendment VII, states in relevant part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved[.]"

Federal Rule of Civil Procedure 38(a) provides:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by statute of the United States shall be preserved to the parties inviolate.

Federal Rule of Civil Procedure 12(b)(6) provides in relevant part:

> [A] motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted . . . shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

The central issue in this case is whether a private person's right to protect her reputation is entitled to equal protection of the law. Related issues include whether and under what circumstances the media are accountable for disseminating defamatory information and destroying every aspect of

American citizens' personal, business and private lives. The issues arose as a result of Respondents' publication of a four (4) page Business Week magazine article, also published on the "world-wide web," which falsely portrayed Ms. Schuler as having concealed her past medical, business, and personal history (which included service as a double agent for the United States and a sex-change) and which falsely stated that she should have disclosed such matters in securities disclosure documents.

REASONS FOR GRANTING THE WRIT

I.
THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH PETITIONER'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAW

Ms. Schuler's right to protect her reputation is a fundamental and indispensable part of the United States' Constitution. That right is entitled to equal protection under the law and is not to be destroyed by a media intent on selling magazines at any cost. *Rosenblatt v. Baer*, 383 U.S. 75, 92-94 (1966); L. Eldridge, The Law of Defamation § 53, pp. 293-94 (1978). The decisions of the lower courts have permitted Respondents to defile the United States Constitution, and with it, the reputation of Ms. Schuler.

Respondents moved to dismiss Ms. Schuler's claims under Federal Rule of Civil Procedure 12(b)(6). In determining such a motion, the courts below were bound by law to view Ms. Schuler's Amended Complaint for Damages as true, as a whole and in the light most favorable to her. *Innovative Digital*

Equip., Inc., v. Quantum Tech., Inc., 597 F. Supp. 983, 988 (N.D. Ohio 1984); N.M. UJI § 13-1004. (App. at 35-56).

A fair and reasonable reading of the article directly conflicts with the lower courts' determination in this case. Any person reading the article is left with a very negative, false, and defamatory impression of Ms. Schuler. (App. at id.). The article's discussion of consent decrees inflated them to the level of major criminal events when, in fact, such matters were virtually insignificant in this context. Ms. Schuler's unique and extraordinary personal history as patriotic double agent against soviet spies, entrepreneur, and her sex-change were falsely characterized as instruments of deception and criminality. The article's obsession with Schuler's sex, gender and medical sex-change, mentioned over twenty (20) times in the article, exemplifies Respondents' sensationalization of Schuler in an attempt to "shock" its audience into buying its magazines.

Respondents' behavior should not be allowed to stand as an example permitting the media to erode and destroy the lives of American citizens for mere entertainment value or as a tool to sell its wares. The Supreme Court is in the unique position of being able to correct and regulate media behavior such as that exhibited by Respondents, and to reverse the tabloid trend in modern media communications.

At every stage of these proceedings the lower courts have placed Respondents' interests above those of Ms. Schuler. To date, she has not received a hearing in this matter and has not been permitted to discover any information from Respondents. In other words, she has not been accorded an equal right to protect her reputation, as required by law. (App. at 85-136). The Petition should be granted so that the Court can affirm the sacred and fundamental importance of a private

person's reputation and to establish boundaries of media abuse of such persons.

II.
THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH PETITIONER'S CONSTITUTIONAL RIGHT TO A JURY TRIAL AND TO HAVE A FACT FINDER DETERMINE ISSUES

As noted above, the courts below failed to view Ms. Schuler's claims as true in the evidence in the light most favorable to Ms. Schuler and decided matters of fact, innuendo, insinuation, and malice, instead of letting the jury decide such matters. Ms. Schuler's briefs describe in detail the merits of her claims and the lower courts' failure to let a jury determine factual matters. (App. at 57-84, 85-136, 137-168).

Ms. Schuler's right to have a jury determine the facts in her case is inviolate and may not be denied by the lower courts. U.S. Const. Amend. VII; Fed. R. Civ. Pro. 38(a). At every stage of these proceedings the lower courts have failed to construe pleadings and law in Ms. Schuler's favor and have failed to give her a fair or reasonable opportunity to pursue her claims. By granting this Writ, the Court will affirm the right to jury trial guaranteed to American citizens and will restore the importance and significance of that right as it relates to protection of one's reputation. Also, the Court will further define the media's boundaries with regard to private American citizens.

CONCLUSION

This case presents a question of the utmost importance - whether the right to protect one's reputation against defamation has any meaning when that reputation is destroyed by a multinational media corporate entity. The behavior of modern media has become increasingly hostile, malicious, reckless and powerful. Multinational media entities such as Respondents now command great wealth and have come to believe that they are above the law. By granting certiorari, the Court can correct this false impression and reinforce the notion that even Respondents must follow the law.

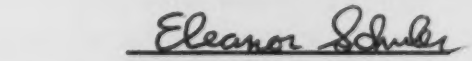
By granting certiorari, the Court also will be able to establish recognizable boundaries with regard to media communications about private persons and clear penalties for violation of those boundaries, particularly as such communications relate to similarly situated citizens. For far too long now, the media have abused the privileges of the First Amendment at the expense of American citizens. Tabloid sensationalism has replaced once reputable journalism and have become the norm. The founding fathers did not intend for the United States Constitution to be used as an excuse for the media to defame and ruin the lives of American citizens and the Court can prevent such a result by accepting certiorari of this case.

By taking a fresh look at the present day media and its slash and burn behavior with regard to private citizens. By doing so, the Court will be able to reexamine and alter media boundaries to coincide with present day technology and its ability to disseminate false and defamatory information worldwide and in record time.

Ms. Schuler's extraordinary personal history has made

her the subject of bias, prejudice, fear, and misunderstanding. The lower courts' treatment of her case exemplifies the impact of such biases or preconceptions and reflects serious rank prejudice due to Ms. Schuler's unique past. Ms. Schuler has been denied equal protection of the law and her right to have a jury determine the issues in her case. Meanwhile, Respondents' loathsome behavior is allowed to continue. By granting certiorari, this Court can restore justice and establish fair and reasonable limits on media communications which coincide with technological advances in spreading such communications. Also a grant of certiorari will allow the Court to correct the lower court opinions which do not coincide with Ms. Schuler's constitutional rights or with a fair and reasonable reading of the subject article. Accordingly, Petitioner respectfully requests that the Court grant her Petition for Writ of Certiorari and such other relief the Court deems proper.

Respectfully submitted,



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App. 1

No._____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1998

ELEANOR SCHULER,
Petitioner,

vs.

THE MCGRAW-HILL COMPANIES, INC., including BUSINESS WEEK, an unincorporated division or subsidiary of THE MCGRAW-HILL COMPANIES, INC., a New York Corporation, BUSINESS WEEK ONLINE, GARY WEISS, individually and as employee of THE MCGRAW-HILL COMPANIES, INC., and MICHAEL SCHROEDER, individually and as employee of THE MCGRAW-HILL COMPANIES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ELEANOR SCHULER,
Plaintiff-Appellant,

v.

THE MCGRAW-HILL COMPANIES, INC., BUSINESS WEEK, a part of or subsidiary of McGraw-Hill Inc., a New York corporation doing business in New Mexico; BUSINESS WEEK ONLINE; GARY WEISS AND MICHAEL SCHROEDER, individually and as employees of The McGraw-Hill Companies, Inc.,
Defendants-Appellees.

No. 97-2225
(D.C. No. CIV-96-292-SC)
(D.N.M.)
(Filed April 22, 1998)

ORDER AND JUDGEMENT *

Before **BRORBY, BARRETT and BRISCOE,** Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgements; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument, and appellant's request for oral argument is denied.

Plaintiff Eleanor Schuler brought this action alleging defamation and other torts relating to defendants' publication in Business Week magazine in September 1994 of an article entitled "Did the Amex Turn a Blind eye to a 'showcase' Stock?". The article was subtitled, "The Bizarre Printron Case Shows the Exchange Too Often Ignores the Most Glaring Signs of Trouble," and it discusses the American Stock Exchange's ("Amex") listing of small companies on its Emerging Company Marketplace ("ECM"). The article focuses on Printron, Inc., an Albuquerque company of which Plaintiff had been chairman and chief executive officer. As it relates to plaintiff, the district court aptly summarized the article as follows:

> The article refers to Plaintiff's status as a transsexual and it treats certain aspects of her life when she was a man known as John Huminik, Jr. The article also examines Plaintiff's involvement in two lawsuits filed against her by the Securities and Exchange Commission ("SEC"). One of the lawsuits was filed against Plaintiff in the mid-1970s when she was John Huminik; the other was filed against Plaintiff in 1991 when she was Eleanor Schuler, that is, after her sex change. Both lawsuits were resolved by injunctions barring Plaintiff from

committing future securities law violations. In both cases, Plaintiff neither admitted nor denied the allegations against her; however, she signed consent decrees agreeing to entry of the permanent injunctions.

After Printron was listed on the ECM, the value of its stock plummeted from fourteen dollars ($14.00) per share to twenty-two cents ($.22) per share. The article criticizes the Amex for failing to screen companies properly before listing them on the ECM. In addition, the article criticizes Printron for failing to reveal to investors Plaintiff's involvement in the SEC lawsuit filed against her when she was a man. The article raises the question of why Schuler received such lenient treatment in the 1991 lawsuit, and the article speculates that perhaps the SEC did not know that Huminik and Schuler were the same person.

Schuler v. McGraw-Hill Cos., ___ F. Supp. ___, No. CIV. 96-292 SC/RLP, 1997 WL 809755, at *1-2 (D.N.M. June 11, 1997).

Plaintiff filed this action asserting claims for defamation; invasion of privacy through false light, publication of private facts and intrusion; intentional infliction of emotional distress; interference with contractual and prospective business relations; and prima facie tort. She contends generally that the article defamed her by stating or implying that she was dishonest and deceptive, that she underwent her sex change to conceal her past, and that she concealed her sex change and prior SEC problems from the Amex, investors and the SEC.

On defendants' motion pursuant to Fed. R. Civ P. 12(b)(6), the district court dismissed the complaint. The court concluded that the article did not include any false statements of fact on which to base the defamation or false light claims. The court rejected plaintiff's claim for publication of private facts because her sex and name change had previously been discussed in magazine and newspaper articles. It concluded that because the article did not contain defamatory falsehoods or other indication of outrageous conduct, plaintiff did not state a claim for intentional infliction of emotional distress. The court also held that because her interference with business relations claims were premised on her claims for defamation, invasion of privacy an infliction of emotional distress which had failed, these claims should fail as well. Finally, the court concluded that plaintiff abandoned her intrusion and prima facie tort claims, and in any event, her allegations did not state valid claims. Plaintiff appeals the dismissal of all claims except the latter two.

We review a district court's dismissal of a cause of action for failure to state a claim de novo, and will uphold a dismissal "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle [her] to relief, accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff." Yoder v. Honeywell, Inc., 104 F.3d 1215, 1224 (10th Cir.), cert. denied, 118 S. Ct. 55 (1997). We have fully considered plaintiff's arguments and reviewed the record, and we reject plaintiff's contention that she stated valid claims. Therefore, for substantially the same reasons as stated by the district court, we affirm the district court's dismissal of her complaint.

The judgment of the district court is AFFIRMED.

Entered for the Court

/s/

Wade Brorby
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ELEANOR SCHULER,

Plaintiff-Appellant,

v.

No. 97-2225
(Filed May 27, 1998)

THE MCGRAW-HILL COMPANIES, INC.; BUSINESS WEEK, a part of or subsidiary of McGraw-Hill Inc., a New York corporation doing business in New Mexico; BUSINESS WEEK ONLINE; GARY WEISS and MICHAEL SCHROEDER, individually and as employees of The McGraw-Hill Companies, Inc.

Defendants-Appellees

ORDER

Filed May 27, 1998

Before BRORBY, BARRETT, and BRISCOE, Circuit Judges.

Appellant's petition for rehearing is denied by the panel that rendered the decision. The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P.35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of the Court

/S/

by: Audrey Weigel
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELEANOR SCHULER

Plaintiff

vs.

No. Civ. 96-292 SC/RLP
(Filed June 11, 1997)

THE McGRAW-HILL COMPANIES, INC., including BUSINESS WEEK, an unincorporated division or subsidiary of THE MCGRAW-HILL COMPANIES, INC., a New York corporation, BUSINESS WEEK ONLINE; GARY WEISS, individually and as employee of the McGRAW-HILL COMPANIES, INC., and MICHAEL SCHROEDER, individually and as employee of THE McGRAW-HILL COMPANIES, INC.,

Defendants

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendants' Motion to Dismiss, filed January 6, 1997. The Court, having considered the motion and memoranda submitted by the parties, and being apprised of the applicable law, finds that the motion is well taken. I shall grant the motion for the reasons set forth

below.

I. BACKGROUND

This lawsuit arises out of an article in BUSINESS WEEK magazine. Plaintiff avers various claims, including defamation, invasion of privacy, interference with business relations, intentional infliction of emotional distress, and prima facie tort. In a Memorandum Opinion and Order filed in October 1996, I denied Plaintiff's Motion to Remand, and I directed Plaintiff to file an amended complaint in order to provide Defendants a more definite statement of her defamation claim. Plaintiff filed her First Amended Complaint, and Defendants now seek dismissal of that complaint for its alleged failure to state a claim upon which relief can be granted.

II. DEFENDANTS' MOTION TO DISMISS

A. Legal Standard

Granting a motion to dismiss for failure to state a claim is "'a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice.'" Ramirez v. Oklahoma Dept. of Mental Health, 41 F. 3d 584, 586-87 (10th Cir. 1994) (*quoting* Morgan v. City of Rawlins, 792 F. 2d 975, 978 (10th Cir. 1986). When ruling on a 12 (b)(6) motion, I must construe the plaintiff's complaint liberally. Swanson v. Bixler, 750 F. 2d 810, 813 (10th Cir. 1984). All of the well-pleaded allegations in the complaint must be accepted as true. Albright v. Oliver, 114 S. Ct. 807, 810 (1994). Conclusory allegations, however, need not be taken as true. Swanson, 750 F. 2d at 813. All reasonable inferences must be indulged in favor of the plaintiff. Weatherhead v. Globe International, Inc., 832 F. 2d 1226, 1228

(10th Cir 1987). A claim may be dismissed only when "no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

B. Facts

The facts, for the purposes of the motion to dismiss, are as follows. In September 1994, BUSINESS WEEK ran an article entitled "Did the Amex Turn a Blind Eye to a 'Showcase' Stock?" The article's subtitle stated, "[t]he bizarre Printron case shows the exchange shows the exchange too often ignores the most glaring signs of trouble." The article recounts a chapter in the story of the American Stock Exchange's ("the Amex") listing of small companies on the Emerging Company Marketplace ("ECM"). In particular, the article focuses on Printron, Inc., an Albuquerque-based company. Prior to the time the article was published, Plaintiff had been the CEO of Printron.

The article refers to Plaintiff's status as a transsexual and it treats certain aspects of her life when she was a man known as John Huminik, Jr. The article also examines Plaintiff's involvement in two lawsuits filed against her by the Securities and Exchange Commission ("SEC"). One of the lawsuits was filed against Plaintiff in the mid-1970s when she was John Huminik; the other was filed against Plaintiff in 1991 when she was Eleanor Schuler, that is, after her sex change. Both lawsuits were resolved by injunctions barring Plaintiff from committing future securities law violations. In both cases, Plaintiff neither admitted nor denied the allegations against her; however, she signed consent decrees agreeing to entry of the permanent injunctions.

After Printron was listed on the ECM, the value of its

stock plummeted from fourteen dollars ($14.00) per share to twenty-two cents ($.22) per share. The article criticizes the Amex for failing to screen companies properly before listing them on the ECM. In addition, the article criticizes Printron for failing to reveal to investors Plaintiff's involvement in the SEC lawsuit filed against her when she was a man. The article raises the question of why Schuler received such lenient treatment in the 1991 lawsuit, and the article speculates that perhaps the SEC did not know that Huminik and Schuler were the same person.

C. Discussion

1. Defamation

In general, a plaintiff must prove the following elements in order to prevail on a defamation claim: 1) the defendant published a defamatory communication; 2) the communication contained a false statement of fact; 3) the communication was concerning the plaintiff; and 4) the communication proximately caused actual injury to the plaintiff's reputation. N.M. UJI § 13-1002 (1997). In addition , a plaintiff must prove a certain level of culpability on the part of the defendant. The level of culpability that the plaintiff must prove depends upon whether the plaintiff is considered a public figure. The question of whether a person is a public figure is a question of law for the court. Marchiondo v. Brown, 98 N.M. 394, 399 (1982).

If the plaintiff is a public figure, she must prove that the defendant acted with actual malice when publishing the defamatory communication. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). That is, a public figure must prove that the defendant knew the statement was false, or that the defendant acted with reckless disregard for the truth or

falsity of the statement. Id at 280. By contrast, an ordinary negligence standard of proof applies to a private defamation plaintiff. Newberry v. Allied Stores, Inc., 108 N.M. 424, 429, 773 P. 2d 1231, 1236 (1989). Thus, a private defamation plaintiff need only prove that the defendant negligently failed to recognize the falsity of the statement.

Plaintiff alleges that she was a public figure from 1966 to 1979. She claims however, to have been a "private figure" at all times relevant to this action. The Supreme Court has expressly declined to decide "whether or when an individual who was once a public figure may lose that status by the passage of time." Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 166 n. 7 (1979). In any event, it is not necessary for me to decide the issue. I shall assume, without deciding, that Plaintiff is not a public figure; therefore, her claim that Defendant's article was defamatory will be governed by an ordinary negligence standard. If she has not stated a claim under this standard, she would be unable to state a claim under the more stringent "actual malice" standard.

As for the article itself, as stated above, it must be defamatory. A statement is defamatory if "it has a tendency to render the party about whom it is published contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or hinder virtuous men from associating with him." Andrews v. Stallings, 119 N.M. 478, 482, 892 P. 2d 611, 615 (Ct. App. 1995) (citation omitted). The defamatory communication must contain a false statement of fact. The expression of an opinion or an idea is generally protected by the First Amendment to the United States Constitution. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974); *but cf.* Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990) (no separate constitutional privilege for opinions apart from

protections delineated in prior cases). However, an opinion can be actionable "if it implies the allegation of undisclosed defamatory facts as the basis of or the opinion." Andrews, 119 N.M. at 482, 892 p. 2d at 615 (*citing* RESTATEMENT (SECOND) OF TORTS § 566 (1976)). The trial court determines in the first instance whether a statement is fact or opinion, assuming the statement is unambiguously one or the other. Marchiondo, 98 N.M. at 404, 649 P.2d at 472 (1982) (citation omitted).

One final requirement of a defamatory communication, as noted above, is that the communication must be concerning the plaintiff. "The communication is concerning the plaintiff if the person to whom it was communicated reasonably understood that it was intended to refer to the plaintiff." N.M. UJI § 13-1005 (1997); *see also* RESTATEMENT (SECOND) OF TORTS § 564 (1977) ("[a] defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer.")

With the above precepts in mind, I turn now to the merits of Plaintiff's defamation claim. Plaintiff points to various portions of the Business Week article which she claims are defamatory. She distinguishes between statements which are allegedly defamatory *per se* and those which are allegedly defamatory *per quod*. The *per se*/*per quod* distinction "has probably been overtaken by rulings of the United States Supreme Court" Newberry, 108 N.M. at 429, 773 P. 2d at 1236. While the New Mexico Supreme Court has not abolished the distinction outright, it has noted its dissatisfaction with jury instructions incorporating the distinction. Marchiondo, 98 N.M. at 403, 649 P. 2d at 471. Accordingly, the latest version of the N.M. Uniform Jury Instructions does not contain any such

distinction. *See* N.M. UJI § 13-1002 (1997), committee comment (noting that, in keeping with Marchiondo, the current instruction abolishes the *per se/per quod* distinction). I, therefore, will draw no distinction between the statements which Plaintiff claims are actionable. Throughout the discussion which follows, the allegedly defamatory statements will be noted in italics.

a. "Change sex, change the past: before becoming Printron CEO as Eleanor Schuler, John Huminik Jr. ran two companies the SEC accused of fraud. Who knew?"

Defendants argue that this does not constitute a false statement of fact. That the SEC accused John Huminik and two of his companies of fraud is a true statement. Plaintiff claims that the statement implies that Schuler changed her sex in order to conceal an SEC filing rather than to cure her gender dysphoria syndrome. Plaintiff also claims that the SEC knew that Schuler and Huminik were one and the same person. The latter contention is at least debatable, since the SEC declined to comment during Defendants' preparation of the article. As for the former contention, regardless of the medical reasons for Plaintiff's decision to change her sex, the article raises the legitimate issue of whether Plaintiff's sex change worked to her advantage by concealing part of her past. I agree that this is not a false statement of fact, nor is it defamatory.

b. "Did the Amex turn a blind eye to a 'showcase' stock?"

Defendants argue that this is a question , not a statement of fact. I agree. Plaintiff argues that the question insinuates wrongdoing on her part. However, taken in isolation, as well as in the context of the rest of the article, this question is not

concerning Plaintiff. Rather, the question implies criticism of the stock exchange.

c. "Finance Investigations"

Defendants argue that this heading is not even a part of the article. Instead, it merely identifies the section of the magazine in which the article appears. This phrase does not constitute a false statement of fact; therefore, it cannot defame Plaintiff.

d. "The bizarre Printron case shows the exchange too often ignores the most glaring signs of trouble."

Defendants argue that this statement criticizes the stock exchange, not Plaintiff. Furthermore, it contains protected opinions, namely that the Printron case is "bizarre" and that the Amex "too often" ignores signs of trouble. I agree.

e. "But she didn't like to talk about that."

Plaintiff argues that this statement is defamatory because it subjects her "to ridicule and contempt as a loyal U.S. citizen." Plaintiff's Response to Motion to Dismiss, at 5. From the context of the article, it appears that the statement refers to Plaintiff's days (when she was a man) as an FBI agent battling Soviet spies during the Cold War, about which she published a book. Stating that Plaintiff does not like to talk about those days is not defamatory, even if she does like to talk about those days. Not every falsehood stated about a person rises to the level of defamation. Furthermore, "[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. Gertz, 418 U.S. at 340.

f. "Checkered Record"

Defendants argue that the Constitution protects them from incurring liability for expressing the opinion that Plaintiff's record is "checkered." Plaintiff argues that it is for the jury to decide whether this phrase constitutes an opinion. I find that this phrase unambiguously states an opinion, and, as such, is not defamatory as a matter of law.

g. "[T]here was a stain on her record. She had twice been sued in Federal Court by the SEC, twice agreeing to injunctions, without admitting or denying guilt, that prohibited her from violating the securities laws. One of the injunctions was known to the Amex when it approved Printon's listing on the ECM. The other was not."

Plaintiff insists that these statements are patently false because by law, she had no duty to disclose the 1975 injunction, and , in addition, she signed both consent decrees using the name "Eleanor Schuler."[1] Defendants counter that whether there was a "stain" on Plaintiff's record is a matter of opinion. Furthermore, the statement that Amex knew of one injunction but not the other is not a statement concerning Plaintiff. Finally, Defendants argue that the remainder of the statement is true. I agree with Defendants. In addition, I note that the issue of whether Plaintiff had a duty to disclose the earlier injunction is open to legal interpretation, and the article is clear in pointing that out.

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[1]The first consent decree was signed late in 1975, around the time of Plaintiff's sex change operation. The 1975 consent decree contains Eleanor Schuler's signature. Beneath the signature line are the words "John Huminik, Jr., now known as Eleanor L. Schuler."

h. "Eleanor Schuler had two records of alleged securities law transgressions--one as a woman, and one as a man. In fact, the name 'Eleanor Schuler' was one that she had made up out of thin air."

Plaintiff argues that this statement is false because she signed the earlier consent decree "Eleanor Schuler." Therefore, she reasons, the earlier injunction was entered against Schuler and not Huminik. However, the earlier SEC lawsuit was filed against John Huminik. Although the consent decree is a matter of public record, Huminik was the party of record in that lawsuit. A search for litigation filed against "Schuler" may not reveal the lawsuit against Huminik. Thus, the first sentence in this statement is true, and, therefore, not defamatory.

Plaintiff argues further that her new name was not "made up out of thin air," but, rather, was "thoroughly researched and thought out." Plaintiff's Response to Motion to Dismiss, at 6. I do not think the two contentions are mutually exclusive. In any event, it goes without saying that the names "John Huminik" and "Eleanor Schuler" bear little resemblance to one another. I fail to see how use of the turn of phrase "out of thin air" defames Plaintiff.

i. "Her earlier SEC record, and her change in gender, were concealed by Printron not only from Barnes but from the Amex' 'blue ribbon' panel of Wall Street notables that had handpicked the 23 ECM companies. Schuler also hid her previous identity, and the injunction, from securities regulators in New York, in a 'sunshine law' filing 14 months before the day the balloons fell on the Amex floor."

Defendants argue, as to the second statement, that it is true and is a matter of public record. Plaintiff argues that the

statement insinuates that she lied to the SEC. It is undisputed, however, that Plaintiff did not disclose her previous identity nor her previous injunction in the sunshine law filing. Whether she even had a duty to do so, as discussed above, is a matter of legal opinion. But even if she did not have a legal duty to disclose the fact that she formerly used another name, one could infer that her response, "no," to the question, "[have you] used or been known by any other name?" constituted concealment.

Plaintiff continues to argue that she did not conceal anything which is evident because the consent decree refers to both names, and because her "name and sex had been changed all the way back to her birth certificate," a public record. Plaintiff's Response to Motion to Dismiss at 6. This argument is not only nonresponsive, but it is irrelevant. At issue are Plaintiff's responses in the sunshine law filing. The fact remains that she answered "no."

As to the first statement, Defendants argue that accusations against Printron are not concerning Plaintiff. I agree. In the alternative, even if Plaintiff is so closely identified with Printron that the statement does concern her, it is not a false statement. Plaintiff does not argue that Printron did disclose her earlier lawsuit to investors and to the Amex. To say that both consent decrees were signed in her new name is, as noted above, nonresponsive.

j. "And the Amex is still reeling from the ECM imbroglio, even though its greatest embarrassment, Printron, has never been publicly aired."

Defendants argue that this statement expresses constitutionally protected opinions, and, in any event, it is not concerning Plaintiff. Plaintiff does not respond to this argument.

I agree that this statement does not defame Plaintiff.

k. "Schuler/Huminik affair," "the next Huminik/Schuler exploit," "Huminik/Schuler matter"

Plaintiff complains that these phrases suggest that she has a multiple personality disorder or that she is "involved in a game of hide and seek." Plaintiff's Response to Motion to Dismiss, at 12. Defendants counter that these phrases are convenient shorthand for referring to the matters reported in the article. Most obviously, these phrases do not amount to false statements of fact. Referring to Plaintiff using her current and former names does not constitute defamation, especially considering the subject matter of the article. Nor is it defamatory to refer to the situation in which Plaintiff has been involved as an "affair," "exploit," or "matter."

l. "Printron was little more than a fraud--a `sting,' as the suit puts it."

Plaintiff fails to note that the article states that this is an allegation from a lawsuit filed against Printron in United States District Court in New York. Defendants argue that, as such, it is protected by the fair report privilege which provides that "no liability will attach for the republication of the defamatory statements so long as the republication is a fair and accurate report of an official or public proceeding." Stover v. Journal Publishing Co., 105 N.M. 291, 294, 731 P.2d 1335, 1338 (Ct. App. 1985). This privilege can be abused if a publisher does not give a fair and accurate report of the proceeding. Id, 105 N.M. at 295, 731 P.2d at 1339. Plaintiff does not argue that Defendants have abused this privilege, nor does she respond in any way to Defendants' argument. I find that this statement is indeed protected by the fair report privilege.

m. "How did Printron get past the gatekeepers at the Amex? Could the Printron fiasco be repeated?"

Defendants argue that these are not false statements of fact, but, rather, questions. Furthermore, they are not concerning Plaintiff. Instead, they are critical of the stock exchange. I agree.

n. "He was a double agent for the FBI and the Soviet government."

Defendants argue that this statement is true. Plaintiff does not respond to this argument. My conclusion that this statement is true is supported by the fact that Plaintiff herself wrote a book entitled Double Agent recounting her experiences as a spy during the Cold War.

o. "As recounted in his slickly written 1997 book."

Plaintiff complains that to describe her book as "slickly written" is not complimentary. Plaintiff argues that even if this statement expresses an opinion, it is not protected because it is based upon the existence of undisclosed defamatory facts. However, she never bothers to identify what those "undisclosed facts" might be. The Court is not required to guess. The term "slick" is capable of various meanings, some complimentary, and some insulting.[2] Nonetheless, to express the opinion that

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[2]As Justice Holmes expressed it, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S 418, 425 (1918).

Plaintiff's book is "slick" simply does not give rise to liability.

p. "Neither the book nor the double-agent career were mentioned in any of Printron's filings with investors and regulators."

Once again, Plaintiff falls back on her "I had no duty to disclose" argument. That simply is not the point. Either Printron did disclose the double agent career, or it did not. Plaintiff does not claim that it did. Furthermore, the very next sentence in the article states that Printron did not have a duty to disclose such information according to SEC rules.

q. "'we have nothing against transsexuals.'"

This is a direct quotation from the lawyer representing an investor who sued Printron. Plaintiff does not dispute the accuracy of the quotation. Instead she argues that the statement insinuates "that transsexualism is a negative state of being, " and that she had a duty to disclose her sex change in the prospectus. Plaintiff's Response to Motion to Dismiss, at 12. Even if Plaintiff's characterizations are accepted, such "insinuations" would constitute protected opinions.

r. "At issue is not her sex change, but rather the extent to which her concealment of that change masked other things."

Plaintiff once again argues that she concealed nothing, relying on the fact that the consent degree was signed in her new name. We have covered this ground previously. The argument is without merit.

s. "The trouble...arises whenever Schuler's pre-Schuler activities are mentioned in Printron's public disclosures. Time after time, they refer to Schuler as a 'she'--even when discussing positions held when Schuler was a `he'".

Plaintiff argues that the reason all the Printron disclosures use the feminine pronoun is because all of the "documents are signed by Eleanor Schuler, a female." Plaintiff's Response to Motion to Dismiss, at 13. It is undisputed, however, that the first SEC lawsuit was filed against John Huminik. In any event, Plaintiff does not dispute that the public disclosures do, indeed use only the feminine pronoun. That is what is at issue.

t. "Was Schuler being shy--or was she improperly misleading investors?"

This is not a statement at all, but rather, a question. Plaintiff argues that the question insinuates that she has faced criminal charges. She also argues that there is no evidence to support an allegation that she misled investors. Plaintiff's arguments are unavailing in the context of a defamation action.

u. "Zimmermann maintains that a previous injunction is a `material event' that must be disclosed beyond the five-year period set by the rules."

Zimmermann is the lawyer representing an investor who sued Printron. He is expressing a legal opinion, which is not actionable. And, as the article points out in the next line, a securities lawyer questioned on the matter stated, "[i]f you ask a dozen lawyers, you'll get a dozen answers." Amended Complaint for Damages, Ex. 1, p.4,col. 1, ¶ 3.

v. "John Huminik was no longer exhibiting a James Bond persona. 'Marine blue shadow haloes the eyelids...The Post went on to describe the sex change and, in graphic detail....None of this would amount to a hill of beans if Eleanor Schuler, as Printron CEO, hadn't fallen afoul of the SEC."

Plaintiff argues that the statement is false. She claims that she has never fallen afoul of the SEC because as CEO of Printron, she has never been sanctioned. This is irrelevant. The SEC has filed two lawsuits against Schuler. Thus, the characterization is a fair one. In any event, it is a matter of opinion whether Plaintiff has "fallen afoul" of the SEC.

w. "The Huber-Schuler ties were shrugged off by the blue-ribbon panel. 'We were assured by the Amex Staff that the issue had been resolved.'"

Plaintiff was brought into the company (Printron) by Mr. Huber, who is a convicted felon and disbarred lawyer. She does not dispute this. Instead, Plaintiff argues that the statement implies that she and Huber were engaged in a conspiracy. She further argues that she was not aware of Huber's past, and she was not under an obligation to investigate. Whether she knew anything about Mr. Huber is irrelevant. "Ties" can be attributed to two people simply because they are employed by the same company. There is nothing defamatory about such a term.

x. "But Hamarat and another former panel member...now say that the panel didn't know that Eleanor Schuler used to be John Huminik--or that Schuler consented to not one but two injunctions by the SEC. If they had known, they say, Printron's listing would never have been approved."

Plaintiff relies on her stock argument that she did not conceal her former identity. She does not dispute, however, that panel members have stated they did not know that Eleanor Schuler used to be John Huminik. Thus, there is no false statement of fact contained within this passage.

y. "The SEC's mild treatment of Schuler in 1991 raises yet another issue: Did the SEC know in 1991 that Schuler was Huminik?"

Quite obviously, once again what we have here is a question. Plaintiff insists that the answer to the question is an affirmative one, and that the article implies that the answer is a negative one. Plaintiff's insistence notwithstanding, Defendants' conduct in posing the question is simply not actionable.

z. "One explanation might be that the SEC felt so much time had passed that it would not pursue a criminal contempt action against Schuler."

This statement expresses a theory or idea. Plaintiff argues that the statement insinuates that she committed criminal acts. On the contrary, the statement speculates as to why Schuler was allowed to sign another consent decree after she had previously been enjoined from committing securities violations. There are various plausible theories, but simply advancing them, as Defendants have done here, is not actionable.

aa. "But they are listed as two separate people, with one `incident' to his name and one to hers."

Plaintiff fails to note that just prior to this statement, the article explains that the National Association of Securities

Dealers has both John Huminik and Eleanor Schuler in its database. Plaintiff does not dispute the truth of either statement. Rather, she falls back on the argument that she signed both consent decrees as Eleanor Schuler. This is irrelevant to the issue of whether the electronic database to which Defendants refer attributes the earlier consent decree to John Huminik. Either it does or it does not. Plaintiff does not dispute that it does.

bb. "A NASD spokesman notes that more detailed information, such as social security numbers, is only maintained for NASD members--not corporate officers who fall afoul of the SEC."

Defendants argue that this statement is critical of the National Association of Securities Dealers, not of Plaintiff. Plaintiff has failed to respond to this argument. I agree with Defendants that this statement does not defame Plaintiff.

In sum, I find that the article entitled "Did the Amex Turn a Blind Eye to a `Showcase' Stock?" published in the September 12, 1994 edition of BUSINESS WEEK magazine, did not defame Plaintiff. I note that although I have analyzed each allegedly defamatory statement separately, I have considered each statement in the context of the entire article. Whether the statements are considered in isolation, or in context, they do not meet the elements of defamation according to the law of New Mexico. In regard to Plaintiff's defamation claim, in general, it is worth recalling the words of Judge Learned Hand. He said that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." United States v. Associated Press, 52 F.

Supp. 362, 372 (S.D. N.Y. 1943).

2. Invasion of Privacy

Plaintiff avers three separate invasion of privacy claims: 1) false light; 2) publication of private facts; and 3) intrusion. I shall address each in turn.

a. False Light

False light invasion of privacy is closely related to defamation. Andrews, 119 N.M. at 492, 892 P.2d at 625. However, in order to state a claim for false light invasion of privacy, a plaintiff need not prove that s/he has been defamed. Rather, "'[i]t is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position.'" Moore v. Sun Publishing Corp., 118 N.M. 375, 383, 881 P.2d 735, 743 (Ct. App. 1994) (*quoting* RESTATEMENT (SECOND) OF TORTS § 652E cmt. b, at 395). Thus, like defamation, false light invasion of privacy requires proof of a false statement of fact. Andrews, 119 N.M. at 492-93, 892 P.2d at 625-626.

The majority of the statements upon which Plaintiff bases her false light claim are also relied upon to support her defamation claim. I have considered these statements, as well as the additional statements and photographs that allegedly placed Plaintiff in a false light. Furthermore, I have considered Plaintiff's arguments, which essentially mirror those she made in support of her defamation claim. I find that Plaintiff has failed to establish that the article contains false statements of fact which portrayed her in a false light. Thus this claim must fall.

b. Publication of Private Facts

"This tort involves the publication of true but intimate or private facts about the plaintiff, such as matters concerning the plaintiff's sexual life or health." Moore, 118 N.M. at 383, 881 P.2d at 743 (*quoting* RODNEY A. SMOLLA, LAW OF DEFAMATION § 10.01[2], at 10-3). In order to be actionable, the facts disclosed may not be public. McNutt v. New Mexico State Tribune Co., 88 N.M. 162, 166, 538 P.2d 804, 808 (1975) (*citing* PROSSER ON TORTS § 117, at 810-11 (1971)). Plaintiff concedes that in the 1970's, she granted interviews to THE WASHINGTON POST and PEOPLE magazine, concerning her sex change. She argues that the purpose of those interviews "was to inform the public about people...who suffered from gender reversal." Plaintiff's Response to Motion to Dismiss, at 21. She then proceeds to argue that Defendants invaded her privacy because they published facts concerning her sex change, "a topic...of no legitimate concern to the public." Plaintiff's Response to Motion to Dismiss, at 22. Plaintiff cannot have it both ways. She sought publicity at the time of her sex change. Even if she shunned publicity several years later, her sex change is a matter of public record. In addition, as Defendants point out, mention of Plaintiff's sex change was not gratuitous, but was central to the article's thesis. I find that Plaintiff has failed to state a claim for invasion of Privacy based on the publication of private facts.

c. Intrusion

"This tort, distinct from but related to trespass, involves an invasion of the plaintiff's 'private' space or solitude--eavesdropping on private conversations or peeping through the bedroom window, for example." Moore, 118 N.M. at 383, 881 P.2d at 743 (*quoting* RODNEY A. SMOLLA, LAW OF

DEFAMATION § 10.01[2], at 10-3). The intrusion need not be physical. RESTATEMENT (SECOND) OF TORTS § 652B (1977). However, the intrusion must be upon a person's "private affairs or concerns." Id.

Defendants argue that Plaintiff has merely repeated her allegations of publication of private facts, and that they do not state a claim for intrusion. I agree. In addition, Plaintiff has failed to respond to Defendants' motion on this cause of action. Therefore, she has apparently abandoned this claim.

3. Intentional Infliction of Emotional Distress

In order to prevail on a claim of intentional infliction of emotional distress, a plaintiff must show that "defendant's conduct was extreme and outrageous, and was done recklessly or with the intent to cause severe emotional distress." Andrews, 119 N.M. at 491, 892 P.2d at 624. Extreme and outrageous conduct goes "'beyond all possible bounds of decency, and [is] to be regarded as atrocious, and utterly intolerable in a civilized community.'" Id (*quoting* RESTATEMENT (SECOND) OF TORTS § 46 (1965)). As for the emotional distress inflicted, it must be so severe that no reasonalbe person could be expected to endure it. Dominguez v. Stone, 97 N.M. 211, 215, 638 P.2d 423, 427 (Ct. App. 1981). "It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." Salazar v. Furr's, Inc., 629 F. Supp. 1403, 1411 (D. N.M. 1986) (*quoting* RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965)).

The gravamen of this claim appears to be that the article made numerous references to Plaintiff's "sex," "gender," or "transsexual" status, and that Defendants failed to "check facts"

before publishing the article. As discussed above, the article does not contain defamatory falsehood. Furthermore, the references to Plaintiff's transsexual status were highly relevant to the central inquiry of the article. In short, there is nothing extreme or outrageous about Defendants' conduct. Accordingly, their motion will be granted on this claim, as well.

4. Interference with Contractual Relations/ Prospective Advantage

In order to state a claim for tortious interference with existing or prospective contractual relations, a plaintiff must allege that the defendant "interfered [with contractual relations] with an improper motive or by improper means, or acted without justification or privilege." Quintana v. First Interstate Bank, 105 N.M. 784, 786, 737 P.2d 896, 898 (Ct. App. 1987) (internal citations omitted). The defendant acts with an "improper motive" when s/he acts solely to harm plaintiff. M & M Rental Tools, Inc. v. Milchem, Inc., 94 N.M. 449, 454, 612 P.2d 241, 246 (Ct. App. 1980). "Improper means" include "violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood." Id. (citation omitted). The plaintiff bears the burden of proving that the interference was improper. Anderson v. Dairyland Ins. Co., 97 N.M. 155, 159, 637 P.2d 837, 841 (1981). There is a somewhat more difficult burden placed on the plaintiff who seeks to prove interference with prospective advantage:

> 'American courts are not as willing to protect interests in prospective contractual relations as they are to protect interests in existing contracts. Where the defendant is accused of interfering with the plaintiff's opportunity to enter into

> contracts with third persons, a strong showing must be made that the defendant acted not from a profit motive but from some other motive, such as personal vengeance or spite.'

Anderson, 97 N.M. at 158, 637 P.2d at 840 (*quoting* J. HENDERSON & R. PEARSON, THE TORTS PROCESS 1166 (2d ed. 1981)).

Plaintiff bases her claim for interference on the premise that Defendants defamed her, invaded her privacy, and intentionally inflicted emotional distress on her. I have found that Plaintiff has failed to state a claim for either of these three torts. Furthermore, there is simply no evidence that Defendants acted with an improper motive or used improper means when they published the article. In publishing the article, Defendants were exercising their First Amendment right to freedom of the press. I find that Plaintiff has failed to state a claim for interference with existing or prospective contractual relations.

5. Prima Facie Tort

The elements of prima facie tort are as follows: "(1) defendant's lawful but intentional act; (2) defendant's intent to injure the plaintiff; (3) injury to the plaintiff; and (4) no justification for defendant's act." Andrews, 119 N.M. at 493, 892 P.2d at 626 (*citing* Schmitz v. Smentowski, 109 N.M. 386, 394, 785 P.2d 726, 734 (1990)). Prima facie tort is intended "to provide remedy for intentionally committed acts that do not fit within the contours of accepted torts." Schmitz, 109 N.M. at 396, 785 P.2d at 736. "[P]rima facie tort should not be used to evade stringent requirements of other established doctrines of law." Id., 109 N.M. at 398, 785 P.2d at 738.

Plaintiff's reliance on prima facie tort as a means of recovery is misplaced. The conduct alleged by Plaintiff clearly fits within the contours of several traditional torts. Plaintiff is, then, relying on prima facie tort to evade the requirements of these more traditional torts which is not the proper use of this tort. In addition, Plaintiff failed to respond to Defendants motion with regard to this claim. Thus, she has apparently abandoned it.

NOW, THEREFORE, IT IS ORDERED that Defendants' Motion to Dismiss [doc. #18], filed Januray 6, 1997, should be, and hereby is, GRANTED.

/s/Santiago E. Campos
SENIOR UNITED STATES DISTRICT JUDGE

Counsel for Plaintiff: Donna Trujillo Dodd, Albuquerque, New Mexico

Counsel for Defendant: William S. Dixon, Charles K. Purcell, RODEY, DICKASON, SLOAN, AKIN & ROBB, Albuquerque, New Mexico

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELEANOR SCHULER,
Plaintiff,

vs.

No. Civ. 96-292 SC/RLP
(Filed June 11, 1997)

THE McGRAW-HILL COMPANIES, INC., including BUSINESS WEEK, an unincorporated division or subsidiary of THE McGRAW-HILL COMPANIES, INC., a New York Corporation, BUSINESS WEEK ONLINE, GARY WEISS, individually and as employee of THE McGRAW-HILL COMPANIES, INC., and MICHAEL SCHROEDER, individually and as employee of THE McGRAW-HILL COMPANIES, INC.,
Defendants.

ORDER OF DISMISSAL

THE COURT, having granted Defendants' Motion to Dismiss in a Memorandum Opinion and Order entered contemporaneously herewith, hereby dismisses Plaintiff's Amended Complaint for Damages in its entirety.

/s/Santiago E. Campos
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELEANOR SCHULER,
Plaintiff,

v.

No. CIV 96-0292 SC/RLP
(Filed October 23, 1996)

THE McGRAW-HILL COMPANIES, INC., including BUSINESS WEEK, an unincorporated division or subsidiary of THE McGRAW-HILL COMPANIES, INC., a New York Corporation, BUSINESS WEEK ONLINE, GARY WEISS, individually and as employee of THE McGRAW-HILL COMPANIES, INC., and MICHAEL SCHROEDER, individually and as employee of THE McGRAW-HILL COMPANIES, INC.,

Defendants.

AMENDED COMPLAINT FOR DAMAGES

COMES NOW the Plaintiff, Eleanor Schuler, by and through her counsel of record, Donna Trujillo Dodd, and states the following in support of her Complaint against Defendants:

1. At all times material to this action Plaintiff was a United States citizen and a resident of Sandoval County, New Mexico.

2. At all times material to this action Defendants, The McGraw-Hill Companies, Inc., includes its unincorporated division or subsidiary "Business Week" and Business Week Online. Also, at all times material to this action, McGraw was a New York Corporation duly authorized to do business in New Mexico with its principal place of business in New York.

3. Upon information and belief, at all times material to this action Defendant, Gary Weiss was employed by Business Week and is believed to be a resident of New York.

4. Upon information and belief, at all times material to this action Defendant, Michael Schroeder was employed by Business Week and is believed to be a resident of the Washington, D.C. Region.

5. Upon information and belief, Defendants were engaged in the general business of investigating, editing, researching, reviewing, publishing, producing, printing, and distributing items including Business Week magazine in hard copy and electronic internet form (Exhibit 2).

6. Upon information and belief Business Week magazine publishes matters of business and financial interest.

7. All acts or omissions complained of herein occurred within the United States, Canada and on the global internet through Business Week Online (Exhibit 2).

8. The jurisdiction of this Court is proper under 28 U.S.C. Sections 1331, 1332, and 1343(a)(3) (1989). The matter in controversy exceeds the sum of fifty thousand dollars ($50,000), exclusive of interest and costs.

9. Venue is properly in this district under 28 U.S.C. Section 1391 (1989).

10. Plaintiff, once a public figure (1966-1979), regained the mantel of a private citizen engaged in ordinary business. Defendants attempted to vortex Plaintiff back into the public light.

11. At all relevant times material to this action Plaintiff was a private figure.

12. On or about September 12, 1994, Defendants authored, investigated, edited, researched, published, produced, printed, and distributed an article entitled "DID THE AMEX TURN A BLIND EYE TO A `SHOWCASE' STOCK ?" A copy of that article is attached hereto as Exhibit 1. Plaintiff's Exhibit 2 is Business Week Online's electronic internet version.

13. The article contained the following items and statements:

a. Photograph of Plaintiff in black and white in contrast to all other surrounding color photographs, accentuating Ms. Schuler's femininity depicting close up of Plaintiff in social attire and social setting and pose while other pictures of business people are photographed in professional business attire and professional settings. Exhibit 1, p. 1, column 2.

b. Photograph caption "CHANGE SEX, CHANGE THE PAST: BEFORE BECOMING PRINTRON CEO AS

ELEANOR SCHULER, JOHN HUMINIK, JR. RAN TWO COMPANIES THE SEC ACCUSED OF FRAUD. WHO KNEW ?" Exhibit 1, p. 1, column 2.

c. "DID THE AMEX TURN A BLIND EYE TO A `SHOWCASE' STOCK ?" Exhibit 1, p. 2, title.

d. "Finance INVESTIGATIONS" Exhibit 1, p. 2, page heading.

e. "The bizarre Printron case shows how the exchange too often ignores the most glaring signs of trouble." Exhibit 1, p. 1, column 1 (table of contents) and Exhibit 1, p. 2, subtitle.

f. "But she didn't like to talk about that." Exhibit 1, p. 2, column 1, ¶ 3.

g. "CHECKERED RECORD." Exhibit 1, p. 2, column 1, ¶ 4 subheading.

h. "there was a stain on her record. She had twice been sued in Federal Court by the SEC, twice agreeing to injunctions, without admitting or denying guilt, that prohibited her from violating the securities laws. One of the injunctions was known to the Amex when it approved Printron's listing on the ECM. The other was not." Exhibit 1, p. 2,

column 2, ¶ 1.

i. "Eleanor Schuler had two records of alleged securities law transgressions-one as a woman, and one as a man. In fact, the name `Eleanor Schuler' was one that she had made up out of thin air." Exhibit 1, p. 2, column 2, ¶ 2.

j. "Before a sex-change operation in the late 1970s, she had used the name her parents gave her:" Exhibit 1, p. 2, column 2, ¶ 2.

k. "Her earlier SEC record, and her change in gender were concealed by Printron not only from Barnes but from the Amex' `blue ribbon' panel of Wall Street notables that had handpicked the 23 ECM companies. Schuler also hid her previous identity, and the injunction, from securities regulators in New york, in a `sunshine law' filing 14 months before the day the balloons fell on the Amex floor (box)." Exhibit 1, p. 2, column 2, ¶ 2-column 3, ¶ 1.

l. "And the Amex is still reeling from the ECM imbroglio, even though its greatest embarrassment, Printron, has never been publicly aired." Exhibit 1, p. 2, column 3, ¶ 2.

m. Insert photographs of Plaintiff and caption "HE DID/SHE DID: PRINTRON'S PAST . . . The SEC may have thought they were two separate people." Exhibit 1, p. 2, columns 2-3.

n. "Schuler/Huminik affair," Exhibit 1, p. 3, column 1, ¶ 1.

o. "Printron was little more than a fraud-a "sting," as the suit puts it," Exhibit 1, p.3, column 2-3, ¶ 2.

p. "How did Printron get past the gatekeepers at the Amex? Could the Printron fiasco be repeated?" Exhibit 1, p. 3, column 3, ¶ 1.

q. "A good place to address these questions is at the very beginning-in the story of Eleanor Schuler's previous manifestation, John Huminik, Jr...." Exhibit 1, p. 3, column 3, ¶ 2.

r. "He was a double agent for the FBI and the Soviet government." Exhibit 1, p. 3, column 3, ¶ 3.

s. "As recounted in his slickly written 1967 book," Exhibit 1, p. 3, column 3, ¶ 4.

t. "Neither the book nor the double-agent career were mentioned in any of Printron's filings with investors and

regulators." Exhibit 1, p. 3, column 3, ¶ 5.

u. ""We have nothing against transsexuals,"" Exhibit 1, p. 4, column 1, ¶ 1.

v. "At issue is not her sex change, but rather the extent to which her concealment of that change masked other things." Exhibit 1, p. 4, column 1, ¶ 1.

w. "The trouble . . . arises whenever Schuler's pre-Schuler activities are mentioned in Printron's public disclosures. Time after time, they refer to Schuler as a `she'- even when discussing positions held when Schuler was a `he.'" Exhibit 1, p. 4, column 1, ¶ 2.

x. "Moreover, the filings say that Schuler was a `self-employed technology and corporate consultant' from 1966 to 1991. In fact, Schuler, as Huminik, was president of General Industrial Corp. and General Enterprises Corp., which allegedly defrauded investors during the 1970s." Exhibit 1, p. 4, column 1, ¶¶ 2-3.

y. "Huminik repeatedly lied to investors about GIC. Huminik agreed to a

permanent injunction barring him from making untrue statements, and otherwise defrauding investors, in the future. He agreed to the injunction without admitting or denying the SEC's allegations." Exhibit 1, p. 4, column 1, ¶ 3.

z. "Was Schuler being shy-or was she improperly misleading investors?" Exhibit 1, p. 4, column 1, ¶ 4.

aa. "Schuler was within her rights to hide her previous gender and to not disclose the 1976 injunction, because of the SEC rule requiring disclosure only for five years." Exhibit 1, p. 4, column 1, ¶ 4.

ab. "Zimmerman maintains that a previous injunction is a 'material event' that must be disclosed beyond the five-year period set by the rules." Exhibit 1, p. 4, column 1, ¶ 4.

ac. "the next Huminik/Schuler exploit" Exhibit 1, p. 4, column 1, ¶ 4.

ad. "John Huminik was no longer exhibiting a James Bond persona. 'Marine blue shadow haloes the eyelids,'...The *Post* went on to describe the sex change and, in graphic detail...None of this would amount to a hill of beans if Eleanor Schuler, as Printron CEO, hadn't fallen

afoul of the SEC." Exhibit 1, p. 4, column 1, ¶ 5 - column 2, ¶ 1.

ae. "The Huber-Schuler ties were shrugged off by the blue-ribbon panel. 'We were assured by the Amex staff that the issue had been resolved,'" Exhibit 1, p. 4, column 2, ¶ 2 - column 3, ¶ 1.

af. "But Hamarat and another former panel member,...now say that the panel didn't know that Eleanor Schuler used to be John Huminik-or that Schuler consented to not one but two injunctions by the SEC. If they had known, they say, Printron's listing would never have been approved." Exhibit 1, p. 4, column 3, ¶ 1.

ag. "The SEC's mild treatment of Schuler in 1991 raises yet another issue: Did the SEC know in 1991 that Schuler was Huminik?" Exhibit 1, p. 4, column 3, ¶ 2.

ah. "One explanation might be that the SEC felt so much time had passed that it would not pursue a criminal contempt action against Schuler." Exhibit 1, p. 4, column 3, ¶ 2.

ai. "Huminik/Schuler matter" Exhibit 1, p. 4, column 3, ¶ 2.

aj. "If the SEC didn't know that the Eleanor Schuler of 1991 was the John Huminik of 1976-and the Amex surely didn't know-there was one possible explanation. The Central registry of the National Association of Securities Dealers ... has John Huminik on its data base. And Eleanor Schuler too." Exhibit 1, p. 4, column 3, ¶ 3.

ak. "But they are listed as two separate people, with one 'incident' to his name and one to hers." Exhibit 1, p. 4, column 3, ¶ 3.

al. "A NASD spokesman notes that more detailed information, such as social security numbers, is only maintained for NASD members-not corporate officers who fall afoul of the SEC." Exhibit 1, p. 4, column 3, ¶ 3.

am. "But the Printron disaster and the miserable performance of the other ECM companies make it plain that the Amex hasn't gone far enough." Exhibit 1, p. 5, column 1, ¶ 4.

COUNT I
DEFAMATION
(LIBEL)

14. The foregoing allegations of paragraphs 1 through 13 are incorporated herein by reference.

15. Specifically, statements contained in Exhibit 1 and 2, as set forth in paragraph 13 (b), (f), (h), (i), (k), (l), (r), (s), (v), (ab), (ah), and (ak) are all defamatory per se. Each of the listed paragraphs (in part or in whole) allege information that is false.

16. Specifically, statements contained in Exhibit 1 and 2, as set forth in paragraph 13 (c), (d), (e), (g), (k), (n), (o), (p), (s), (t), (u), (w), (z), (ac), (ad), (ae), (af), (ag), (ai), and (al) are all defamatory per quod. Each of the listed paragraphs make statements filled with false implication, innuendo and insinuation upon which a defamatory inference may be drawn.

17. Said statements in paragraph 16 were made by the Defendants with knowledge of extrinsic facts and information.

18. The published article when read as a whole is malicious and has a tendency to render the Plaintiff contemptible and exposes her to ridicule, public hatred, contempt and disgrace, damages her reputation and hinders association in the business community.

19. Said statements in paragraphs 15 and 16 were made negligently and rose to a level of actual malice in that Defendants made the statements with knowledge of there falsity or with a reckless disregard of whether they were true or false.

20. Defendants acted with malice and Plaintiff is entitled to an award of punitive damages.

21. Defendants acted with knowledge and or reckless disregard as to its falsity which directly and proximately caused injury and irreparable harm to the Plaintiff including but not

limited to harm to her privacy rights, peace of mind, mental anguish and distress, embarrassment, humiliation, compensatory damages, harm to her name and reputation, loss of employment, loss of current and future business relations, impairment of reputation and standing in the community, personal humiliation, mental anguish, and pain and suffering.

COUNT II
INVASION OF PRIVACY
(FALSE LIGHT)

22. The foregoing allegations of paragraphs 1 through 21 are incorporated herein by reference.

23. Defendants' broadly disseminated publication identifying Plaintiff, as referenced above in paragraph 13 (a), (b), (c), (e), (f), (g), (h), (i), (k), (m), (t), (v), (w), (x), (y), and (ag) were false individually and when considered in the context of the entire article invaded her personal right to privacy.

24. Defendants' acts and or omissions, including publication of the subject article and its contents referenced in paragraph 13 (a), (b), (c), (e), (f), (g), (h), (i), (k), (m), (t), (v), (w), (x), (y), and (ag) publicly disclosed matters concerning Plaintiff that unreasonably placed her in a false light before the public.

25. Specifically, statements contained in Exhibit 1 and 2, as set forth in paragraph 13 (f), (g), (h), (i), (k), (m), (t), (v), and (w) place Plaintiff in a false light by containing false statements and by unfairly and improperly implying or insinuating that Plaintiff had a duty and failed to disclose her sex change and thus, her prior employment and history, in order to conceal improper acts in her past.

26. Defendants' acts and or omissions, including its publication of matters concerning Plaintiff's private life is of a kind that would be highly offensive to a reasonable person.

27. Defendants also acted with knowledge and or reckless disregard as to the falsity of the publicized matters concerning Plaintiff and the false light in which Plaintiff would be placed.

28. As a direct and proximate cause of Defendants' wrongful acts, Plaintiff suffered severe and irreparable harm including but not limited to, invasion of her privacy rights, interests, peace of mind. Defendants' acts caused mental anguish, distress, embarrassment, humiliation, compensatory damages, harm to her name and reputation, and loss of earnings and earning capacity.

29. Further, Defendants acted intentionally with knowledge and or with reckless disregard of Plaintiff's privacy rights and are liable for punitive damages.

COUNT III
INVASION OF PRIVACY
(PUBLICATION OF PRIVATE FACTS)

30. The foregoing allegations of paragraph 1 through 29 are incorporated herein by reference.

31. Defendants' broadly disseminated publication regarding Plaintiff, specifically, statements contained in Exhibit 1 and Exhibit 2, as set forth in paragraph 13 (b) "Change Sex", (j), (k) "change in gender [sex]", (m) "HE DID/SHE DID", (q), (u), (v) "At issue is not her sex change", (w) "pre-Schuler activities", "Schuler as a he" "when Schuler was a he" , (x)

"Schuler as Huminik", (aa), (ac), (ad), (af), (ag) "Did the SEC know... that Schuler was Huminik?", (ai), and (aj), (in part or in whole) were intimate or private facts individually and when considered in the context of the entire article invaded her personal right privacy.

32. Defendants' publication and distribution of the subject article throughout the United States, Canada, and internet as referenced in Exhibit 1 and 2, as set forth in paragraph 31 above, unreasonably publicized matters concerning Plaintiff that were intimate or private with respect to her medical treatment and history and contained numerous inapplicable references to her previous sex.

33. Statements contained in Exhibits 1 and 2, as set forth in paragraph 31 above publicly disclosed private information regarding Plaintiff's medical privacy by accentuating her medical history; specifically, the 1975 - 1976 sex change and numerous inapplicable references to her previous sex.

34. Defendants' publication and distribution of private facts and matters concerning Plaintiff's medical history was of a kind that would be highly offensive and objectionable to a reasonable person.

35. Defendants' publication and distribution of private facts and matters concerning Plaintiff's medical history was of a kind that was of no legitimate concern to the public.

36. Defendants also acted with knowledge and or reckless disregard as to the factual dissemination of her private medical history.

37. As a direct and proximate cause of Defendants'

wrongful acts, Plaintiff suffered severe and irreparable harm including but not limited to, invasion of her privacy rights, interests, peace of mind. Defendants' acts caused mental anguish, distress, embarrassment, humiliation, compensatory damages, harm to her name and reputation, and loss of earnings and earning capacity.

38. Further, Defendants acted intentionally with knowledge and or with reckless disregard of Plaintiff's privacy rights and are liable for punitive damages.

COUNT IV
INVASION OF PRIVACY
(INTRUSION)

39. The foregoing allegations of paragraph 1 through 38 are incorporated herein by reference.

40. Defendants publications regarding Plaintiff, specifically, statements contained in Exhibit 1 and 2, as set forth in paragraph 13 (b), (j), (k), (m), (q), (u), (v), (w), (x), (aa), (ac), (ad), (af), (ag), (ai), and (aj), (in part or in whole) were intimate or private facts individually and collectively when considered in the context of the entire article intruded on Plaintiff's right to privacy.

41. Defendants' publication and distribution of the subject article throughout the United States, Canada, and internet as referenced in Exhibit 1 and 2, set forth in paragraph 13 (b), (j), (k), (m), (q), (u), (v), (w), (x), (aa), (ac), (ad), (af), (ag), (ai), and (aj) unreasonably publicized intimate and private facts and matters concerning Plaintiff, intruded into her medical treatment and history and made numerous inappropriate references to her previous sex.

42. Statements contained in Exhibits 1 and 2, as set forth in paragraphs 13 (b), (j), (k), (m), (q), (u), (v), (w), (x), (aa), (ac), (ad), (af), (ag), (ai), and (aj) above, intruded into Plaintiff's space. Defendants publicly disclosed private information about Plaintiff's medical privacy by accentuating her medical history; specifically, her 1975 - 1976 sex change and numerous inappropriate references to her previous sex.

43. Defendants' intrusion of into the private space or solitude of Plaintiff with respect to her medical history was of a kind that would be highly offensive and objectionable to a reasonable person.

44. Defendants' intentional intrusion into Plaintiff's medical history invaded Plaintiff's interest in solitude, seclusion, and her private concerns.

45. Defendants also acted with knowledge and or reckless disregard as to the ramifications of the intrusion into Plaintiff's private medical history.

46. As a direct and proximate cause of Defendants' wrongful acts, Plaintiff suffered severe and irreparable harm including but not limited to, invasion of her privacy rights, interests, peace of mind. Defendants' acts caused mental anguish, distress, embarrassment, humiliation, compensatory damages, harm to her name and reputation, and loss of earnings and earning capacity.

47. Further, Defendants acted intentionally with knowledge and or with reckless disregard of Plaintiff's privacy rights and are liable for punitive damages.

COUNT V
PRIMA FACIE TORT

48. The foregoing allegations of Paragraph 1 through 47 are incorporated herein by reference.

49. Defendants are lawfully engaged in the business of publishing and distributing of a business magazine. Defendants intentionally authored, published, edited and distributed the September 12, 1994, offending article.

50. Defendants' statements contained in Exhibit 1 and 2, as set forth in paragraph 13 (a) - (am) (in part or in whole) were written and subsequently published to defame the Plaintiff, personally.

51. Defendants' statements contained in Exhibit 1 and 2, as set forth in paragraph 13 (a) - (am) (in part or in whole) were written and subsequently published to discredit the Plaintiff professionally.

52. – Defendants' statements contained in Exhibit 1 and 2, as set forth in paragraph 13 (a) - (am) (in part or in whole) subsequently injured the Plaintiff in that the Plaintiff was discredited professionally.

53. Defendants' statements contained in Exhibit 1 and 2, as set forth in paragraph 13 (a) - (am) (in part or in whole) subsequently injured the Plaintiff in that the Plaintiff was dishonored personally.

54. Defendants' statements contained in Exhibit 1 and 2, as set forth in paragraph 13 (a) - (am) (in part or in whole) which discredited the Plaintiff both personally and

professionally, were written without justification.

55. Defendants authored, published, edited and distributed the offending article with the specific intent to harm the Plaintiff personally and professionally without excuse or justification.

56. Defendants also acted with knowledge and or reckless disregard as to the defamatory ramifications the article would depict on Plaintiff personally and professionally.

57. As a direct and proximate cause of Defendants' wrongful acts, Plaintiff suffered severe and irreparable harm including but not limited to, invasion of her privacy rights, interests, peace of mind. Defendants' acts caused mental anguish, distress, embarrassment, humiliation, compensatory damages, harm to her name and reputation, and loss of earnings and earning capacity.

58. Further, Defendants acted intentionally with knowledge and or with reckless disregard of Plaintiff's reputation in the community and are liable for punitive damages.

COUNT VI
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

59. The foregoing allegations of paragraphs 1 through 58 are incorporated herein by reference.

60. Defendants' conduct toward Plaintiff in researching, authoring, editing, publishing, and distributing the offending article contained in Exhibits 1 and 2, as more fully set out above in paragraph 13 (a) - (am) was extreme, outrageous

and unreasonable.

61. Further, Defendants' acted with reckless disregard of Plaintiff's rights and interests and or with the intent to cause Plaintiff severe emotional distress.

62. As a direct and proximate cause of Defendants' wrongful acts, Plaintiff suffered severe and irreparable harm including but not limited to, invasion of her privacy rights, interests, peace of mind. Defendants' acts caused mental anguish, distress, embarrassment, humiliation, compensatory damages, harm to her name and reputation, and loss of earnings and earning capacity.

63. Defendants' outrageous conduct in publishing the offending article made 16 references to aspects of Plaintiff's "sex," "gender" and "transsexual" status.

64. Defendants acted with reckless disregard of Plaintiff's rights and interests, with the intent to cause Plaintiff severe emotional distress, thus making them liable for punitive damages.

COUNT VII
INTERFERENCE WITH CONTRACTUAL RELATIONS

65. The foregoing allegations of paragraphs 1 through 64 are incorporated herein by reference.

66. Plaintiff had an existing contract with Printron, Inc. and was engaged in the business of serving as a corporate officer and was the principal fund raiser for the corporation.

67. Defendants maliciously published and distributed the offending article contained in Exhibits 1 and 2, as more fully set out above in paragraph 13 (a) - (am) with an intent to injure and impugn the reputation of the Plaintiff and the corporation.

68. Upon circulation of said article, the Plaintiff stopped receiving the numerous phone calls and possible contacts which comprise her business.

69. Defendants' offending article caused a chilling effect within her business community and instigated conditions under which Plaintiff was unable to perform and retain her job resulting in a constructive breach of Plaintiff's employment contract.

70. Defendants made the defamatory statements with intent to interfere with Plaintiff's corporate employment relationship resulting in pecuniary damage.

71. Defendants acted with knowledge and or reckless disregard for Plaintiff's contractual relations.

72. As a direct and proximate cause of Defendants' wrongful acts, Plaintiff suffered severe and irreparable harm including but not limited to, harm to her employment interests, compensatory damages, harm to her name and reputation, and loss of earnings and earning capacity.

73. Further, Defendants acted intentionally with knowledge and or with reckless disregard of Plaintiff's employment interests and are liable for punitive damages.

COUNT VIII
INTERFERENCE WITH PROSPECTIVE ADVANTAGE

74. The foregoing allegations of paragraphs 1 through 73 are incorporated herein by reference.

75. Defendants' article was maliciously written and distributed with intent to damage Plaintiff's reputation within the business community, resulting in loss of future business opportunities and loss of pecuniary interests.

76. Defendants knew that the offending article contained in Exhibits 1 and 2, as more fully set out above in paragraph 13 (a) -(am) would cause interference with Plaintiff's reputation and future business relations.

77. The damage caused by the offending article prevented Plaintiff from conducting business within the community and decimated her future business relations.

78. Defendants' tortious conduct has and will continue to compound Plaintiff's damages into the future because Plaintiff's age will hinder her from obtaining employment of similar salary and status.

79. Defendants acted with knowledge and or reckless disregard for Plaintiff's perspective business relations.

80. As a direct and proximate cause of Defendants' wrongful acts Plaintiff suffered severe and irreparable harm including but not limited to, harm to future employment interests, compensatory damages, harm to her name and reputation, and loss of earnings and future earning capacity.

81. Further, Defendants acted intentionally with knowledge and or with reckless disregard of Plaintiff's future employment interests and are liable for punitive damages.

Plaintiff hereby respectfully requests a trial by jury.

WHEREFORE, Plaintiff prays the Court to enter judgment in her favor and against Defendants on all counts, for compensatory damages, punitive damages, special damages, pre-judgment interest, attorney fees, costs, and such other relief as the Court deems just and proper.

Respectfully Submitted,

/s/

Donna Trujillo Dodd
Attorney for Plaintiff
509 Roma Ave., NW
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(505) 243-5060

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ELEANOR SCHULER,

Plaintiff,

v. **No. CIV 96-0292 SC/RLP**
(Filed January 6, 1997)

THE McGRAW-HILL COMPANIES, INC., including BUSINESS WEEK, an unincorporated division or subsidiary of THE McGRAW-HILL COMPANIES, INC., a New York Corporation, BUSINESS WEEK ONLINE, GARY WEISS, individually and as employee of THE McGRAW-HILL COMPANIES, INC., and MICHAEL SCHROEDER, individually and as employee of THE McGRAW-HILL COMPANIES, INC.,

Defendants.

PLAINTIFF'S RESPONSE TO MOTION TO DISMISS

COMES NOW Plaintiff Eleanor Schuler, by and through her attorney Donna Trujillo Dodd, and respectfully requests that the Court deny Defendants' Motion to Dismiss (Motion) on grounds that Plaintiff's Complaint properly states a claim upon

which relief can be granted. Plaintiff states the following in support of her Response:

This Motion, and the underlying Complaint, concern a September 12, 1994, article entitled "DID THE AMEX TURN A BLIND EYE TO A 'SHOWCASE' STOCK?", that Defendants' authored and distributed. The article contained numerous defamatory statements about the Plaintiff when read individually and when taken as a whole. Plaintiff seeks damages for the improper acts of The McGraw-Hill Companies, Inc., including Business Week, Business Week Online, Gary Weiss, and Michael Schroeder.

REQUIREMENTS FOR DISMISSAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

A motion to dismiss tests only the sufficiency of pleadings and assumes the truth of all facts plead in the complaint. *Carol v. Bunt,* 50 N.M. 127, 172 P.2d 116 (1946). As correctly stated by the Defendants in their Motion, dismissal is proper only if there is no set of possible facts under which the Plaintiffs may be granted relief. *McCasland v. Prather,* 92 N.M. 192, 585 P.2d 336 (1978).

In determining such a motion, the Court "must accept all well-pleaded allegations in the complaint as true and construe them in the light most favorable to the Plaintiff." Innovative Digital Equip., Inc. v. Quantum Tech., Inc., 597 F. Supp. 983, 988 (N.D. Ohio 1984). The Court may consider documents attached to Plaintiff's Complaint, in determining whether Plaintiff's Complaint is sufficiently plead. Id. At issue is whether Plaintiff is entitled to offer evidence to support her claims, not the merits of the claims themselves. Dean, 854 F. Supp. at 631-32.

Motions to dismiss under Rule 12(b)(6) are viewed with disfavor. Resolution Trust Corp. v. Dean, 854 F. Supp. 626, 632 (D. Ariz. 1994). Dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) can be granted only if it appears beyond doubt that the Plaintiff can prove no set of facts that would entitle her to judgment. Lafoy v. HMO Colorado, 988 F.2d 97, 98 (10th Cir. 1993); Dean, 854 F. Supp. at 631. Conversely, the Court should deny such a motion if any legal theory exists for recovery. Innovative Digital Equip., Inc. v. Quantum Tech., Inc., 597 F. Supp. 983, 988 (N.D. Ohio 1984).

In this case, the Defendants' Motion relies upon facts which are outside the scope of the pleadings, and those facts are neither undisputed nor supported by affidavit or deposition testimony. While Plaintiff is not prepared to submit all of its legal arguments at this time, and is not procedurally required to do so, she will present certain legal arguments in response to the Motion to Dismiss.

Defendants pick out a number of statements from the more than four page article and state that they are undisputed facts. Those facts, Defendants claim, are neither defamatory nor invade Plaintiff's privacy and make Plaintiff's case groundless. The exact opposite is true. The article, when read as a whole is malicious and defamatory to Plaintiff. Even if some of the statements are true, arguendo, the article must be read as a whole and then specific statements analyzed separately for each individual harm.

The Defendants state that Plaintiff's claims should be dismissed because they are unwarranted and may create a chilling effect on public disclosure. Nevertheless, the Motion to Dismiss must be analyzed in the light most favorable to the Plaintiff.

COUNT I
PLAINTIFF'S COMPLAINT PROPERLY STATES A CLAIM FOR DEFAMATION

Defamation is recognized as a cause of action in New Mexico. Bookout v. Griffin, 97 N.M. 336, 539 P.2d 1193 (1982); Marchiondo v. N.M. State Tribune Co., 98 N.M. 282, 648 P.2d 321 (Ct. App. 1981). A statement is defamatory if it injures the reputation of the Plaintiff in the community and subjects the Plaintiff to hatred, contempt or ridicule. In order to be actionable, the statement must concern the Plaintiff, be false, and must bring the Plaintiff into disrepute and impeach her honesty, integrity, virtue, or reputation.

A. DEFAMATION PER SE

(1) Complaint Paragraph 13 (b)

> "CHANGE SEX, CHANGE THE PAST: BEFORE BECOMING PRINTRON CEO AS ELEANOR SCHULER, JOHN HUMINIK JR. RAN TWO COMPANIES THE SEC ACCUSED OF FRAUD. WHO KNEW?"

Defendants ask the Court to believe that the statement "CHANGE SEX, CHANGE THE PAST" invokes a question. Defendants want the Court to believe this phrase to be a tag line. This "tag line" is defamatory in that it infers that Schuler changed her sex in order to change her past so the SEC would overlook a 1976 injunction against her when the agency imposed a similarly lenient penalty against her for another episode of alleged securities fraud in 1991. The statement is not a question. There is nothing in the article supporting Defendants' allegation that the SEC overlooked the 1976

injunction because of Plaintiff's sex change and not knowing Schuler to be Huminik, and subsequently imposed a similarly lenient penalty in 1991. Not only is the statement false, but the Defendants try to insinuate Schuler's alleged cover-up by innuendo and insinuation that her sex change was preformed for any reason other than a medical one.

Schuler's sex change was preformed in early 1976. The 1976 consent decree was signed by Schuler and clearly stated "formerly known as John Huminik, Jr.". The 1991 consent decree was also signed by Schuler. The SEC clearly knew she was one in the same. The plain and obvious import outlined in Andrews, 119 N.M. at 485, 892 P.2nd at 618 was to defame Plaintiff. The Defendants would have the readers believe Schuler opted for a sex change operation to conceal an SEC filing rather than to cure a gender disorder.

(2) Complaint Paragraph 13 (f)

"But she doesn't like to talk about that"

Defendants would have the readers believe that Plaintiff didn't like to talk about her "pistol packing" days. This statement is also false. Schuler wrote a book about her adventures as a United States FBI agent. Defendants turn Schuler's patriotism for the United States into a mockery. Plaintiff openly talked about that aspect of her life. Nonetheless, in 1979 Schuler quit making public appearances. She sought the mantel of a private person by relocating to a smaller town, and she ceased making public appearances. The statement is defamatory in that it subjects Schuler to ridicule and contempt as a loyal U.S. citizen. Not only do Defendants make a false statement but in addition, they insinuate that Plaintiff's role as an FBI agent was less than honorable and that Plaintiff tried to hide

it.

(3) Complaint Paragraph 13 (h)

> "There was a stain on her record... One of the injunctions was known to the Amex when it approved Printron's listing on the EMC. The other was not."

This excerpt of the statement is patently false. The SEC regulations hold that any involvement in certain legal proceedings that occurred during the last five years must be disclosed 17 C.F.R. §§ 229.401(f). Although Defendants intimate otherwise, Plaintiff had no duty to disclose the 1976 injunction. In addition, Plaintiff signed both injunctions as "Eleanor L. Schuler" making it known to whoever researched her or Huminik's business history.

(4) Complaint Paragraph 13 (i)

> "Eleanor Schuler had two records of alleged securities law transgressions -- one as a woman and one as a man. In fact, the name `Eleanor Schuler' was one that she had made up out of thin air."

Once again the statement is false. Eleanor Schuler had already completed the sex change operation at the time of the 1976 consent decree. She signed the 1976 consent decree as Eleanor L. Schuler; therefore, both were entered as against Schuler and not Huminik. The name Eleanor L. Schuler was not made up out of thin air as Defendants lead the Court to believe; but, was thoroughly researched and thought out by Plaintiff at the time of the sex change. The name does not have to resemble

"Huminik" to be valid and/or meaningful.

(5) Complaint Paragraph 13 (k)

> "Her earlier SEC record, and her change in gender, were concealed by Printron... Schuler also hid her previous identity, and the injunction, from securities regulators in New York..."

The "box" information as the Defendants put it, ask questions to which Schuler replied. At the time Plaintiff signed the consent decree she had just become Printron's CEO. However, at the time of the infraction which eventually lead to the consent decree, Schuler had no leadership role in the company and merely signed the consent decree on behalf of Printron, Inc., so that the company could proceed with its offering. The questions highlighted by Defendants seek to insinuate that Plaintiff deliberately lied or misled the SEC. Plaintiff's name and sex had been changed all the way back to her birth certificate. Plaintiff did not and does not consider her medical background material to her business proceedings; that which was material had been reported honestly and fairly. Both consent decrees were signed by Schuler, and both are a matter of public record. Additionally, as the 1976 decree was signed by Schuler, it clearly states under the signature line, "John Huminik Jr., now known as Eleanor L. Schuler." Schuler in no way hid her identity nor the 1976 consent from SEC Regulators. However, by blatantly stating that Schuler "hid her previous identity, and the injunction," Defendants' maliciously misstated the facts.

(6) Complaint Paragraph 13 (s)

"As recounted in his slickly written 1967 book"

The phrase "slickly written" on its face is not complementary, despite Defendant's assertions. Defendants' assertions that the statements at issue are "opinions" is not supported by the evidence. In determining whether a communication is or contains a statement of "fact" or "opinion," the fact finder must consider: "(A) The entirety of the communication and the context in which the communication was made; and (B) whether reasonable persons would be likely to understand the communication to be a statement of the Defendants' opinion or a statement of fact." S.C.R.A. 1896, 1-004 (Repl. Pamp. 1986).

"[An] opinion which implies that it is based upon the existence of undisclosed facts is the same as a statement of fact." Id. Where a statement alleged to be defamatory can be interpreted as either fact or opinion, and the Court cannot rule that, as a matter of law, the statement was not understood as fact, "there is a triable issue of fact for the jury." Marchiondo v. Brown, 98 N.M. 394, 404, 649 P.2d 462, 472 (1982) (quoting Bindrim v. Mitchell, 92. Cal. App. 3d 61, 155 Cal. Rptr. 29, 39, cert.denied., 444 U.S. 984, 62 L. Ed. 2d 412, 100 S. Ct. 490 (1979)). Likewise, statements purporting to be opinions often are understood to be factual statements. See Marchiondo, 98 N.M. at 401, 649 P.2d at 469. "[W]here there are implications in the statement "that the writer has private, underlying knowledge to substantiate his comments about Plaintiff," and such knowledge implies the existence of defamatory facts, the statement is deemed to be factual and not protected or privileged. Kurtz v. Independent Pub. Co., Inc., 97 N.M. 243, 246, 638 P.2d 1088, 1091 (Ct. App 1981); Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 472 (1982).

(7) Complaint Paragraph 13 (v)

> "At issue is not her sex change, but rather the extent to which her concealment of that change masked other things."

Defendants argue that the statement above is nothing more than a pointed issue of public concern. The statement is not meant as a "pointed question" but as a malicious defamatory statement made to insinuate that Schuler hid her sex change to conceal the 1976 consent decree. That consent decree was signed by Schuler. She hid nothing about her past business dealings. The Defendants wrote the statement to subject Plaintiff to ridicule and public hatred. Plaintiff had no duty to disclose her medical background. She had the sex change for valid medical purposes; she did not have a sex change operation to hide her past. Furthermore, although Defendants state that the sex change is not at issue, they make reference to it over a dozen times throughout the four page article. Each reference is mean toned and malicious and has absolutely nothing to do with Plaintiff's business dealings.

(8) Complaint Paragraph 13 (ab)

> "Zimmerman maintains that a previous injunction is a 'material event' that must be disclosed beyond the five-year period set by the rules."

Plaintiff both disputes the accuracy of Zimmerman's statement and the manner and tone in which it is conveyed. Defendant's argue the statement is legal opinion, however, statements purporting to be opinion are often understood to be factual statements and questions for the jury. Marchiondo, 98 N.M. at 401, 649 P.2d at 469. The statement is materially false

and is written into the article to insinuate that Plaintiff has committed criminal acts. Defendants imply that Schuler had an obligation to disclose the previous injunction "beyond" five years as being a "material event". This statement is patently false. In fact, 17 CFR Chapter 11 § 229.401 (f) states in part, "involvement in certain legal proceedings. Describe any of the following events that occurred during the past five years and that are material..." Defendant's argue that more statements also pose questions but that still does not make this statement any less defamatory or false.

(9) Complaint Paragraph 13 (ah)

> "One explanation might be that the SEC felt so much time had passed that it would not pursue a criminal contempt action against Schuler."

Defendants suggest that his statement is not `concerning' Schuler. It specifically talks about Schuler and suggests, implies, and insinuates that she committed criminal acts. Defendants try to mask the false statements as theory or opinion. However, such statements describe acts of which there is not a shred of proof. Defendants have written several false statements into the four page article. The Defendants hide behind the cloak of opinion and theory; however, the malicious nature and meaning of the article is clear. Defendant's argue the statement is legal opinion, however, statements purporting to be opinion are often understood to be factual statements and questions for the jury. Marchiondo, 98 N.M. at 401, 649 P.2d at 469.

(10) Complaint Paragraph 13 (ak)

> "But they are listed as two separate people, with one 'incident' to his name and one to hers."

Defendants purport that this statement does not `concern' Schuler. The statement specifically talks about Plaintiff's two consent decrees. The Defendants fail to tell its readers that Schuler's sex change had already taken place and that Plaintiff signed both consent decrees as Eleanor L. Schuler.

Allegations that the article contained false statements "maliciously made" must be taken as admitted and the Complaint cannot be dismissed for failure to state a claim. Stewart v. Ging, 64 N.M. 270, 274, 327 P.2d 333 (1958). Plaintiff's above referenced statement sufficiently state a claim for defamation and thus defendants motion should be denied.

In the event that the Court accepts that the above outlined statements are opinion and theory rather than statements defamatory per se, Plaintiff maintains her cause of action for defamation in that the statements remain defamatory because they are filled with innuendo and insinuation that Plaintiff hid illegal business practices through her sex change when in fact she followed the SEC rules and regulations in filing and simply kept her medical history private, to which she had every right to do.

B. DEFAMATION PER QUOD

New Mexico recognizes liability for statements from which a defamatory inference may be drawn. Moore v. Sun Publishing Corp., 118 N.M. 375, 884 P.2d 735 (Ct. App. 1994). A cause of action will lie for defamation even if the

statement is not per se false if the statement is filled with implication, insinuation or innuendo accompanied by explanatory circumstances.

(1) Complaint Paragraph 13 (c)

"DID THE AMEX TURN A BLIND EYE TO A `SHOWCASE' STOCK?"

Although Schuler's name does not appear in the title, the article concerns her prior business practices and prior two consent decrees. Defendants state that the target of the criticism is the American Stock Exchange, not Schuler, but yet one picture of Schuler & one picture of John Huminik appear on the title page of the offending article. The title insinuates that there was wrongdoing in that Schuler hid her prior consent decree with a sex change operation, that she had a duty to disclose the 1976 consent decree as well as her sex change operation and that the AMEX knew Schuler failed to disclose the aforementioned, and thus ignored said wrongdoing.

(2) Complaint Paragraph 13 (g)

"CHECKERED RECORD" implies a sort of shifty or shady past. Defendants maintain this to be opinion but, once again this is an issue for the jury to decide. See supra pt. I(A)(8)

(3) Complaint Paragraph 13 (k)

"Her earlier SEC record," etc. See supra pt. I(A)(5)

(4) Complaint Paragraph 13 (n)

"Schuler/Huminik affair"

Defendants would have the Court believe the statement was convenient shorthand needless to say, the only shorthand in a four page article. There was never a Huminik-Schuler affair. The above listed statement is not shorthand but in fact words used to portray that Schuler did not act honestly. The statement suggests that Schuler is either a multiple personality or involved in a game of hide and seek.

(5) Complaint Paragraph 13 (s)

"As recounted in his slickly written 1967 book"
See supra pt. I(A)(6).

(6) Complaint Paragraph 13 (t)

"Neither the book nor the double-agent career were mentioned in any of Printron's filings with investors and regulators."

Plaintiff had no duty to disclose such information when in fact there was no such duty imposed by the SEC. Defendants try to circumvent the malicious nature of the statement by stating that the next sentence dispels the implication.

(7) Complaint Paragraph 13 (u)

"'We have nothing against transsexuals'"

Defendants insinuate that transsexualism is a negative state of being and that plaintiff had a duty to disclose her sex change in the perspectus. There is no such requirement.

Defendants further state that the quote does imply anything derogatory about transsexuals in general or Schuler in particular. The fallacy of their argument becomes apparent when one substitutes the term "nigger" or "mexican" for "transsexuals".

(8) Complaint Paragraph 13 (w)

"The trouble... arises whenever Schuler's pre-Schuler activities are mentioned in Printron's public disclosures. Time after time, they refer to Schuler as a `she' -- even when discussing positions held when Schuler was a `he'."

This statement leads the readers to believe that Plaintiff's pre-Schuler activities were both illegal and not disclosed in the Printron filing. In reality, Plaintiff committed no wrong doing. Printron followed the letter of the law and all of the SEC's rules and regulations. Furthermore, Plaintiff had no duty to disclose her sex change. Both consent decrees were signed by Eleanor L. Schuler. Plaintiff agreed to be held accountable for both infractions. Defendants would have the readers believe the two consent decrees were grave criminal acts; however, they are standard pleadings companies admit to when a prospectus has not been fully complied with. Perhaps that is one reason the SEC does not require disclosure beyond five years.

Printron's disclosures refer to Schuler as a "she" because all the documents are signed by Eleanor Schuler, a female. Schuler's sex change occurred in 1976.

(9) Complaint Paragraph 13 (z)

"Was Schuler being shy -- or was she improperly misleading investors?"

Once again the Defendants' insinuate that this is a question of public concern. However, because Plaintiff had never been charged criminally, for Defendants' to insinuate so, was simply false. Furthermore, there is no evidence to illustrate that Plaintiff properly misled investors, thus, to elude is also false.

(10) Complaint Paragraph 13 (ac)

"The next Huminik/Schuler exploit"

See supra pt. I(B)(4), except that "exploit is used rather than "affair."

(11) Complaint Paragraph 13 (ad)

> "John Huminik was no longer exhibiting a James Bond persona. `Marine blue shadow haloes the eyelids,'...The Post went on to describe the sex change and, in graphic detail... None of this would amount to a hill of beans if Eleanor Schuler, as Printron CEO, hadn't fallen afoul of the SEC."

The statement is false because Plaintiff did not and has not fallen afoul to the SEC. Schuler did in fact sign two separate consent decrees, however, as the CEO of Printron, Inc., has never been sanctioned.

(12) Complaint Paragraph 13 (ae)

> "The Huber-Schuler ties were shrugged off by the blue-ribbon panel. `We were assured by the Amex staff that the issue had been resolved.'"

Defendants imply that Huber-Schuler were acting in concert to commit wrongdoing. There is no evidence to support Defendants' notion of conspiracy or any deception whatsoever. Not only was Plaintiff not aware of Huber's past, but she was under no obligation to know, since she was hired by Huber.

(13) Complaint paragraph 13 (af) and (ag)

> "But Hamarat and another former panel member,... now say that the panel didn't know that Eleanor Schuler used to be John Huminik -- or that Schuler consented to not one but two injunctions by the SEC. If they had known, they say, Printron's listing would never have been approved."
>
> "The SEC's mild treatment of Schuler in 1991 raises yet another issue: Did the SEC know in 1991 that Schuler was Huminik?

See supra pt. I(A)(5)

(14) Complaint Paragraph 13 (ai)

"Huminik/Schuler matter" See supra pt. I(B)(4)

Plaintiff's above referenced statements sufficiently state a claim for defamation.

COUNT II
PLAINTIFF'S COMPLAINT PROPERLY STATES A CLAIM FOR FALSE LIGHT INVASION OF PRIVACY

Invasion of privacy is recognized as a cause of action in New Mexico. *Moore v. Sun Publishing Corp.*, 118 N.M. 375, 383, 881 P.2d 735, 743 (Ct. App. 1994), cert. denied, 118 N.M. 430, 882 P.2d 21 (1994). False light invasion of privacy consists of placing one in a false light before the public. Id. To establish such a claim, a plaintiff need only show that she was "given unreasonable and highly objectionable publicity that attributes to [her] characteristics, conduct or beliefs that are false, and so is placed before the public in a false position." Restatement (Second) of Torts § 652E cmt. b, at 395.

"[A] false light claim may be established where true information is published if the information tends to imply falsehoods. Larsen v. Philadelphia Newspapers, Inc., 375 Pa. Super. 66, 543 A.2d 1181, 1189 (Pa. Super. Ct.), appeals denied, 552 A.2d 251 and 552 A.2d 252 and 552 A.2d 968 (1988), cert. denied, 489 U.S. 1096 (1989). See also Jonap v. Silver, 1 Conn. App. 550, 474 A.2d 800, 806 (Conn. Ct. App. 1984) (jury verdict sustained where there was evidence that defendants caused letter to be published in a magazine that attributed to plaintiff views that were not his own and that there was a major misrepresentation of his character, history, activities, or beliefs).

Further New Mexico recognizes the tort of defamation by implication. Moore v. Sun Publishing Corp., 118 N.M. 375, 381, 881 P.2d 735, 741 (Ct. App.), cert. denied, 118 N.M. 430 (1994). In Moore the New Mexico Court of Appeals recognized that "reputational injury caused by a communication

may result not from what is said but from what is implied.'" Id. at 381 (quoting Rodney A. Smolla, Law of Defamation § 4.05[1], at 4-17 (1994)).

The statements outlined by Plaintiff's Complaint (Complaint), and included in its entirety as Exhibit 1 to that Complaint, give "unreasonable and highly objectionable publicity that attributes to [her] characteristics, conduct or beliefs that are false," and which place her before the public in a false position. See Restatement (Second) of Torts § 652E cmt. b, at 395. The statements referenced in Plaintiff's Complaint were made in the context of an internationally circulated "business" periodical, in its "Finance" section. The article appeared within a "Finance" subsection entitled "Investigations." This context is one in which a reasonable person would expect to find statements of fact and in which reasonable persons would interpret statements as factual. Further, the magazine is targeted at business professionals and others associated with and/or interested in business matters. It is in this context that the offending article must be evaluated.

(1) Complaint Paragraphs 13 (a) and (b)

Plaintiff's Complaint paragraph 13 (a) depicts a photograph of Plaintiff in a manner which implies falsehoods. The subject photograph features a close up black and white shot of Plaintiff in a social setting, set in the top, center of the index, in contrast to surrounding color photographs of persons in professional attire and settings. This portrayal of Plaintiff sharply contrasts with the magazine's typical portrayal of business professionals.

Both separately and taken together, the subject photograph and its caption ("CHANGE SEX, CHANGE THE

PAST") attribute to Plaintiff characteristics including the implication that she is deceptive, dishonest, immoral, and untruthful, particularly with regard to her past business dealings. They further imply that Plaintiff changed her sex for other than medical reasons, in order to escape liability or responsibility for some heinous act in her past, and that the authors have knowledge of undisclosed facts supporting such a conclusion. This portrayal of Plaintiff is highly objectionable and unreasonable, particularly in light of the fact that the article's target audience is of the type with whom Plaintiff does business.

Plaintiff denies that she changed sex for other than medical reasons. The reasons for Plaintiff's sex change and her prior and past reputation in the business community are matters of fact which can be proven or disproved. Therefore, Defendants' contentions that these items are constitutionally protected "opinion" is not supported by the evidence and their Motion should be denied on this point.

Defendants assert that Plaintiff's privacy could not be invaded by republication of photograph for which she posed. This is clearly false. The subject photograph is not the photograph published in People magazine.

Further, Defendants characterization of the photograph caption as "a question" is not supported by the evidence. The relevant portion of the caption does not contain a question mark at the end of that phrase and clearly asserts the matters referenced above, including the implication that Plaintiff had good reason to change her past to avoid responsibility for and serious consequences of her past misdeeds.

(2) Complaint Paragraph 13 (f)

> The article also includes the following statements: In her wildly varied career, she had been a welder, entrepreneur, corporate executive, and even a pistol-packing Federal Bureau of Investigation double agent who had battled Soviet spies during the Cold War. But she didn't like to talk about that.

The underlined statement is a false statement of fact. It can be proven or disproved whether Plaintiff "liked to" or in fact "did" talk about her career history. Defendants' statement that Plaintiff didn't like to talk about her past career is unreasonable and highly objectionable particularly in view of facts that she published a book about her experiences as a "double agent" and other discussions of her career. The subject statement attributes to Plaintiff false characteristics, conduct, and/or beliefs including that she is unwilling to discuss or acknowledge her past careers, that she is attempting to hide or conceal her past, that she is untruthful and deceptive, and that she has good reason to hide her past to avoid responsibility for prior misdeeds.

(3) Complaint Paragraphs 13 (h), (k), (t), and (w)

Several paragraphs in the offending article imply that Plaintiff had a duty to disclose certain information, when in fact no such duty existed. For example, Plaintiff's Complaint references the following portions of the offending article:

> One of the injunctions was known to the Amex when it approved Printron's listing on the ECM. The other was not. (h)

> Schuler also hid her previous identity, and the injunction, from securities regulators in New York, in a "sunshine law" filing[.] (k)
>
> Neither the book nor the double-agent career were mentioned in any of Printron's filings with investors and regulators. (t)
>
> Time after time [Printron's public disclosures] refer to Schuler as a "she" - even when discussing positions held when Schuler was a "he." (w)

All of the above statements imply that Plaintiff had a duty to disclose the referenced information and that she failed to do so. Thus, the statements imply falsehoods with regard to Plaintiffs' disclosure duties and attribute to her the characteristics noted above in this section, including deceptive, devious, immoral, and untruthful conduct.

(4) Complaint Paragraph 13 (i)

The article's statement that "[i]n fact, the name `Eleanor Schuler' was one that she had made up out of thin air[,]" places Plaintiff in a false light by stating as a fact that the name was "made up," and by further implying that Plaintiff "made up" the name for fraudulent or deceptive reasons.

(5) Complaint Paragraph 13 (v)

Likewise, Defendant's statement in the offending article that "At issue is not [Schuler's] sex change, but the extent to which her concealment of the change masked other things[,]" falsely states that Plaintiff concealed her sex change and further

implies that she did so in order to "mask" or "conceal" additional matters. As in the case of the above statements, this statement places Plaintiff in a false light by unreasonably and in a highly objectionable manner attributing to her characteristics, belief, and/or conduct including deception, dishonesty, and other misdeeds. Plaintiff sufficiently states a claim for false light on this point.

(6) Complaint Paragraph 13 (x)

Defendants' article also includes the following statements:

> Moreover, the filings say that Schuler was a `self-employed technology and corporate consultant' from 1966 to 1991.
>
> In fact, Schuler, as Huminik, was president of General Industrial Corp. and General Enterprises Corp., which allegedly defrauded investors during the 1970s.

These statements imply that Plaintiff's description of her past employment included in the "filings" is deceptive. As with the above statements, these statements place Plaintiff in a false light by attributing to her false characteristics and conduct, including deception, dishonesty, and an intent to defraud company investors and others. Plaintiff's claims in this regard sufficiently state a claim for false light.

(7) Complaint Paragraph 13 (ag)

The article also included the following statement:

> The SEC's mild treatment of Schuler in 1991 raises yet another issue: Did the SEC know in 1991 that Schuler was Huminik?

The last sentence of this statement clearly implies that the SEC did not know that Schuler was Huminik, thus, implying that Schuler was deceitful, dishonest, and deceptive in some manner with regard to the SEC and her business dealings. In fact, the SEC did know that Schuler was Huminik as evidenced by the Consent, attached hereto as Exhibit 1, regarding the injunction involving General Industrial Corporation and General Enterprises Corporation. Specifically, the Consent's signature line reads "John Huminik, Jr., now known as Eleanor L. Schuler[.]" Defendants' statement and inquiry into this area placed Plaintiff in a false light before the public by stating as a fact and implying that she deceived the SEC by hiding her prior sex change from it, and further, that she did so to further her own devious ends.

When read as a whole, the article clearly indicates that Plaintiff is a deceptive, dishonest, disreputable business person who has committed "offensive" and "illegal" acts. The above statements, and those referenced in Plaintiff's Complaint and incorporated herein by reference, sufficiently state a claim for false light. Interpreting these statements in the light most favorable to Plaintiff, she states a claim upon which relief can be granted and Defendants' Motion is should be denied.

COUNT III
PLAINTIFF'S COMPLAINT PROPERLY STATES A CLAIM FOR INVASION OF PRIVACY (PUBLICATION OF PRIVATE FACTS)

"Every person may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right;* * * *" (Emphasis supplied.) Even the freedom of the press has its limitations. *Blount v. T.D. Publishing Corp.*, 77 N.M. 384, 388, 423 P. 2d 421 (1966) citing *N.M. Const. art. 2, sec. 17.* Constitutional rights of freedom of press, right of privacy, are all relative and not absolute. U.S.C.A. Const. Amends. 1, 4; Const. art. 2, § 17. The framers of our constitution, federal and state, were cognizant of the right of an individual to privacy and sought to prevent unreasonable intrusion, *Trupiano v. United States,* 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663. Ms. Schuler freely admits to giving interviews to People Magazine and the Washington Post. The purpose of which was to inform the public about people, like her, who suffered from gender reversal, a birth defect, not for the purposes of providing a dog and pony show.

Publication of private facts invasion of privacy involves the publication of true but intimate or private facts about the plaintiff, such as matters concerning the plaintiffs sexual life or health. Moore, 77 N.M. at 383.

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> > (a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public. See Restatement (Second) of Torts § 652 D at 383

Defendants' offending article publicized facts about Schuler's sex change, a topic that would be highly offensive to a reasonable person and of no legitimate concern to the public. Certainly Defendants would not suggest that Schuler's sex change was of a legitimate concern to the reading public of Business Week Magazine. The legitimate concern should have been that two consents had been signed by Eleanor Schuler, a person, not that they were signed by Eleanor Schuler, the transsexual who underwent a sex change. In fact, the offending article states that one consent was signed by John Huminik and the other by Eleanor Schuler. That is patently false. Both consents were signed by Eleanor Schuler. Schuler hid nothing.

Complaint paragraphs (b), (j), (k), (m), (q), (u), (v), (w), (aa), (ad), (af), and (aj) all make reference to Schuler's sex change, transsexualism, her prior sex as John Huminik. All of which are private facts of no legitimate concern to anyone but Schuler, and none of which are the least bit relevant to the issue of Eleanor Schuler signing both consent decrees. See Exhibit 1.

Plaintiff concedes that she "pulled back the curtain" when she provided interviews for the Washington Post and People magazine. The limited purpose of which was to inform people about gender reversal. Curtains open and curtains close. "...once a matter has become newsworthy how long does it continue to be newsworthy so that an individual may have no respite from the glare of unsought notoriety. Blount v. TD Publishing, 77 N.M. 384, 423 P.2d 421 (1966). Schuler assumed the mantle of a private citizen by moving to a small town where no one knew her and all publicity ceased. Where

the individuals right of privacy is concerned and where the right of the public to be informed is involved, the question of fact should be resolved by the trier of facts. Id. Defendants' motion should be denied.

COUNT IV
PLAINTIFF'S COMPLAINT PROPERLY STATES A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In order to state a claim for intentional infliction of emotional distress Plaintiff must show that Defendants' conduct was extreme, outrageous, and done intentionally or recklessly causing her severe emotional distress. See Hakkila v. Hakkila, 112 N.M. 172, 175, 812 P.2d 1320, 1323 (Ct. App. 1991). Defendants' conduct referenced in Plaintiff's Complaint and this Response clearly establish a claim for intentional infliction of emotional distress. Defendants' portrayal of Plaintiff in the offending article, its failure to check facts such as whether the SEC knew that Plaintiff had changed her name or sex, and other items referenced herein constitute the type of outrageous conduct that this tort was meant to address.

As noted above, at this stage of the proceedings, Plaintiffs' allegations in her Complaint and related pleadings must be taken as true. Under this standard, Plaintiff has sufficiently plead a claim for intentional infliction of emotional distress and should be permitted to present evidence in support of this claim. Defendants' Motion should be denied.

COUNT V
PLAINTIFF'S COMPLAINT PROPERLY STATES A CLAIM FOR INTERFERENCE WITH BUSINESS RELATIONS

The Defendants interfered with her present and prospective business relations by "maliciously" publishing an article that "caused a chilling effect within the business community." Complaint ¶¶ 66-81. Intentional interference, whether with existing or prospective contracts, may be accomplished by improper means or with improper motive. *Knight v. Snapp-On Tools Corp.*, 3 F. 3rd 1398, 1401 (10th Circuit 1993.). As the defendants did defame Schuler, as well as invade her privacy and commit the tort of outrage against her, the interference with contractual relations count is actionable, as there is basis for finding that the Defendants' conduct was improper. See, e.g. *Redco Corp v. CBS, Inc.*, 758 f.2d 970, 973 (3rd Cir.), cert. denied, 474 U.S. 843 (1985).

Additionally, the Defendants published the article with an improper motive. In the matter at hand, the Defendants did not speak truthfully about matters of public concern, nor did they express opinions based on accurately stated facts. Instead the Defendants published information about Schuler which was false. Complaint ¶¶ 13a. - 13am. Plaintiff has stated a claim upon which relief can be granted and Defendant's motion should be denied.

WHEREFORE, for the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' Motion to Dismiss in its entirety and enter an order requiring Defendants to properly answer and respond to the allegations in Plaintiff's Complaint, and permit this case to proceed to trial on the merits.

Respectfully Submitted,

/s/

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APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELEANOR SCHULER,
Plaintiff/Appellant,

v. **No. 97-2225**
(Filed September 9, 1997)

THE MCGRAW-HILL COMPANIES, INC., including BUSINESS WEEK, an unincorporated division or subsidiary of THE MCGRAW-HILL COMPANIES, INC., a New York Corporation, BUSINESS WEEK ONLINE, GARY WEISS, individually and as employee of THE MCGRAW-HILL COMPANIES, INC.,and MICHAEL SCHROEDER, individually and as employee of THE MCGRAW-HILL COMPANIES, INC.,
Defendants/Appellees.

On Appeal from the United States
District Court for the
District of New Mexico

The Honorable Santiago Campos
District Judge

D.C. No. CIV 96-0292 SC/RLP

APPELLANT'S OPENING BRIEF

Eleanor Schuler

Respectfully submitted,
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STATEMENT REGARDING ORAL ARGUMENT

Appellant desires oral argument.

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Restatement (Second) of Torts § 652E cmt. b 122

Rodney A. Smolla, Law of Defamation
§ 4.05[1] (1994) 123

**THERE ARE NO PRIOR OR
RELATED APPEALS IN THIS CASE**

II. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The United States District Court for the District of New Mexico (trial court) had subject matter jurisdiction over this matter pursuant to 28 U.S.C. Sections 1331, 1332, 1343(a)(3), and 1441. On February 5, 1996, Plaintiff/Appellant Eleanor Schuler (Schuler) filed her Complaint and Demand for Jury Trial in this case in New Mexico's Thirteenth Judicial District Court. Aplt. App., 1-17. On March 4, 1996, Defendants/Appellees McGraw-Hill Companies Inc., including Business Week and Business Week Online (McGraw-Hill), and its employees Gary Weiss (Weiss) and Michael Schroeder (Schroeder) filed a Notice of Removal seeking to have the case removed to the trial court on grounds that the parties were diverse; with Schuler residing in New Mexico, McGraw-Hill a foreign corporation, and Weiss and Schroeder living outside New Mexico. (In this brief "McGraw-Hill" refers to Defendants/Appellees McGraw-Hill, Weiss and Schroeder, unless Weiss and Schroeder are individually referenced). Aplt. App., 18-40. McGraw-Hill then filed a Notice of Filing Motion in Lieu of Answer. Aplt. App. 41.

The Tenth Circuit Court of Appeals (Tenth Circuit) has jurisdiction over this matter under Federal Rule of Appellate Procedure 3. On June 11, 1997, the trial court entered a Memorandum Opinion and Order granting McGraw-Hill's Motion to Dismiss and an Order of Dismissal. Aplt. App., 225-251. The Court's Orders disposed of all claims with respect to the parties in this case. Schuler timely filed a Notice of Appeal on July 10, 1997. Aplt. App., 252-253.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Schuler raises the following issues on appeal:

1. Whether the trial court erred by granting McGraw-Hill's Motion to Dismiss.

IV. STATEMENT OF THE CASE

A. Nature of the Case

This action arose when McGraw-Hill published, produced, authored, edited, investigated, researched, printed, and distributed a four (4) page article appearing in Business Week magazine which included tortious statements regarding Schuler's personal, private and business affairs. Based on that tortious article, Schuler brought this action against McGraw-Hill in New Mexico's Thirteenth Judicial District Court for defamation, invasion of privacy, prima facie tort, outrageous conduct, interference with advantageous relations, and intentional infliction of emotional distress. Aplt. App., 1-17.

B. Course of the Proceedings

McGraw-Hill sought to remove the case to the trial court on March 4, 1996. Aplt. App., 18-40. In lieu of filing an Answer, on March 8, 1997, McGraw-Hill filed a motion package including: 1) McGraw-Hill's Motion for Dismissal or Alternatively for More Definite Statement and supporting brief; 2) Schuler's Response to Motion for Dismissal or Alternatively for More Definite Statement; and 3) McGraw-Hill's Reply Brief in Support of Defendants['] Motion for Dismissal or Alternatively for More Definite Statement. Aplt. App., 43-71.

On April 18, 1997, Schuler filed a motion package including: 1) Schuler's Motion to Remand to State Court and supporting Memorandum Brief; 2) Defendant['] Response to Motion for Remand to State Court; and 3) Schuler's Reply Supporting Plaintiff's Motion for Remand to State Court. Aplt. App., 72-111.

On October 9, 1996, the trial court entered a Memorandum Opinion and Order addressing Schuler's Motion for Remand to State Court and McGraw-Hill's Motion for Dismissal or Alternatively for More Definite Statement. The trial court denied Schuler's Motion for Remand to State Court ruling that it had jurisdiction over the case. Also, the trial court denied McGraw-Hill's Motion to Dismiss Schuler's Complaint, but required Schuler to amend her Complaint to identify specific statements which formed the basis of her claims. Aplt. App., 112-124.

On October 23, 1996, Schuler filed an Amended Complaint for Damages (Amended Complaint) against McGraw-Hill seeking damages for defamation, invasion of privacy, prima facie tort, intentional infliction of emotional distress, interference with contractual relations, and interference with prospective advantage. Aplt. App., 125-153. On January 6, 1997, McGraw-Hill again filed a Motion to Dismiss (Motion) in lieu of filing an answer to Schuler's Amended Complaint. Aplt. App., 155. At that time a motion package was filed which included: 1) McGraw-Hill's Motion to Dismiss and supporting brief; 2) Schuler's Response to Motion to Dismiss; and 3) McGraw-Hill's Reply Brief in Support of Defendants['] Motion to Dismiss. Aplt. App., 155-224. No initial scheduling conference was held in this case and, in accordance with District Court of New Mexico Local Rule (Civil) 26.4(a), discovery was prevented from beginning in this case.

C. Trial Court Disposition

On June 11, 1997, the trial court entered a Memorandum Opinion and Order and an Order of Dismissal granting McGraw-Hill's second Motion to Dismiss. Aplt. App., 225-251. Schuler timely filed a Notice of Appeal on July 10, 1997. Aplt. App., 252.

D. Statement of Relevant Facts

On or about September 12, 1994, Eleanor Schuler was living as a private person in Rio Rancho, New Mexico. Aplt. App., 125, ¶ 1; 126, ¶ 11. At that time, she was employed as a corporate officer with Printron, Incorporated, and enjoyed a good reputation. Aplt. App. 3, ¶ 12.

Also, on or about September 12, 1994, McGraw-Hill published, produced, distributed, printed, authored, edited, researched, and investigated a four (4) page article which appeared in its Business Week magazine, alternately identified as "CHANGE SEX, CHANGE THE PAST: BEFORE BECOMING PRINTRON CEO AS ELEANOR SCHULER, JOHN HUMINIK JR. RAN TWO COMPANIES THE SEC ACCUSED OF FRAUD. WHO KNEW?" and "DID THE AMEX TURN A BLIND EYE TO A `SHOWCASE' STOCK?" Aplt. App., 126, ¶ 12; 143, 144. McGraw-Hill also distributed and made available its article over the internet. Aplt. App., 148-153. The article continues to be available and accessible, world-wide, through that medium.

The article contained the following items and statements referenced in Schuler's Amended Complaint and Schuler's Response to Motion to Dismiss (Response), which for convenience of reference, are lettered as in Schuler's Amended Complaint:

a. Photograph of Plaintiff in black and white in contrast to all other surrounding color photographs, accentuating Ms. Schuler's femininity depicting close up of Plaintiff in social attire and social setting and pose while other pictures of business people are photographed in professional business attire and professional settings. Aplt. App., 127, 143, column 2.

b. Photograph caption "CHANGE SEX, CHANGE THE PAST: BEFORE BECOMING PRINTRON CEO AS ELEANOR SCHULER, JOHN HUMINIK, JR. RAN TWO COMPANIES THE SEC ACCUSED OF FRAUD. WHO KNEW ?" Aplt. App., 127, 143, column 2.

c. "DID THE AMEX TURN A BLIND EYE TO A `SHOWCASE' STOCK ?" Aplt. App., 144, title.

d. "Finance INVESTIGATIONS[.]" Aplt. App., 127, 144 heading.

e. "The bizarre Printron case shows how the exchange too often ignores the most glaring signs of trouble." Aplt. App., 127; 143, column 1 bottom; 144, subtitle.

f. But she didn't like to talk about that." Aplt. App., 127, 144, column 1, ¶ 3.

g. "CHECKERED RECORD." Aplt. App., 127, 144, ¶ 4 subheading.

h. "there was a stain on her record. She had twice been sued in Federal Court by the SEC, twice agreeing to injunctions, without admitting or denying guilt, that prohibited her from violating the securities laws. One of the injunctions was known to the Amex when it approved Printron's listing on the ECM. The other was not." Aplt. App, 127, 144, column 2, ¶ 1.

i. "Eleanor Schuler had two records of alleged securities law transgressions-one as a woman, and one as a man. In fact, the name `Eleanor Schuler' was one that she had made up out of thin air." Aplt. App., 127-28, 144, column 2, ¶ 2.

j. "Before a sex-change operation in the late 1970s, she had used the name her parents gave her[.]" Aplt. App., 128, 144, column 2, ¶ 2.

k. "Her earlier SEC record, and her change in gender were concealed by Printron not only from Barnes but from the Amex' `blue ribbon' panel of Wall Street notables that had handpicked the 23 ECM companies. Schuler also hid her previous identity, and the injunction, from securities regulators in New [Y]ork, in a `sunshine law' filing 14 months before the day the balloons fell on the Amex floor (box)." Aplt. App., 128, 145, column 2, ¶ 2-column 3, ¶ 1.

l. "And the Amex is still reeling from the ECM imbroglio, even though its greatest embarrassment, Printron, has never been publicly aired." Aplt. App., 128, 144, column 3, ¶ 2.

m. Insert photographs of [Schuler] and caption "HE DID/SHE DID: PRINTRON'S PAST . . . The SEC may have thought they were two separate people." Aplt. App., 128, 144, columns 2-3, highlighted box.

n. "Schuler/Huminik affair[]" Aplt. App., 128, 145, column 1, ¶ 1.

o. "Printron was little more than a fraud - a `sting,' as the suit puts it[.]" Aplt. App., 128, 145, columns 2-3, ¶ 2.

p. "How did Printron get past the gatekeepers at the Amex? Could the Printron fiasco be repeated?" Aplt. App. 128, 145, column 3, ¶ 1.

q. "A good place to address these questions is at the very beginning-in the story of Eleanor Schuler's previous manifestation, John Huminik, Jr[.]" Aplt. App., 128, 145, column 3, ¶ 2.

r. "He was a double agent for the FBI and the Soviet government." Aplt. App., 128, 145, column 3, ¶ 3.

s. "As recounted in his slickly written 1967 book[]" Aplt. App., 128, 145, column 3, ¶ 4.

t. "Neither the book nor the double agent career were mentioned in any of Printron's filings with investors and regulators." Aplt. App., 128-29, 145, column 3, ¶ 5.

u. "[`]We have nothing against transsexuals[']" Aplt. App., 129, 146, column 1, ¶ 1.

v. "At issue is not her sex change, but rather the extent to which her concealment of that change masked other things." Aplt. App., 129, 146, column 1, ¶ 1.

w. "The trouble . . . arises whenever Schuler's pre-Schuler activities are mentioned in Printron's public disclosures. Time after time, they refer to Schuler as a `she'- even when discussing positions held when Schuler was a `he.'" Aplt. App., 129, 146, column 1, ¶ 2.

x. "Moreover, the filings say that Schuler was a `self-employed technology and corporate consultant' from 1966 to 1991. In fact, Schuler, as Huminik, was president of General Industrial Corp. [GIC] and General Enterprises Corp., which allegedly defrauded investors during the 1970s." Aplt. App., 129, 146, column 1, ¶¶ 2-3.

y. "Huminik repeatedly lied to investors about GIC. Huminik agreed to a permanent injunction barring him from making untrue statements, and otherwise defrauding investors, in the future. He agreed to the injunction without admitting or denying the SEC's allegations." Aplt. App., 129,

146, column 1, ¶ 3.

z. "Was Schuler being shy-or was she improperly misleading investors?" Aplt. App., 129, 146, column 1, ¶ 4.

aa. "Schuler was within her rights to hide her previous gender and to not disclose the 1976 injunction, because of the SEC rule requiring disclosure only for five years." Aplt. App., 129, 146, column 1, ¶ 4.

ab. "Zimmerman maintains that a previous injunction is a `material event' that must be disclosed beyond the five-year period set by the rules." Aplt. App., 129, 146, column 1, ¶ 4.

ac. "the next Huminik/Schuler exploit" Aplt. App., 129, 146, column, 1, ¶ 4.

ad. "John Huminik was no longer exhibiting a James Bond persona. `Marine blue shadow haloes the eyelids,' . . . The Post went on to describe the sex change and, in graphic detail . . . None of this would amount to a hill of beans if Eleanor Schuler, as Printron CEO, hadn't fallen afoul of the SEC." Aplt. App., 129-30, 146, column 1, ¶ 5.

ae. "The Huber-Schuler ties were shrugged off by the blue-ribbon panel. `We were assured by the Amex staff that the issue had been resolved[.]'" Aplt. App., 130, 146, column 2, ¶ 2 - column 3, ¶ 1.

af. "But Hamarat and another former panel member[] . . . now say that the panel didn't know that Eleanor Schuler used to be John Huminik-or that Schuler consented to not one but two injunctions by the SEC. If they had known, they say, Printron's listing would never have been approved." Aplt. App., 130, 146, column 3, ¶ 1.

ag. "The SEC's mild treatment of Schuler in 1991 raises yet another issue: Did the SEC know in 1991 that Schuler was Huminik?" Aplt. App., 130, 146, column 3, ¶ 2.

ah. "One explanation might be that the SEC felt so much time had passed that it would not pursue a criminal contempt action against Schuler." Aplt. App., 130, 146, column 3, ¶ 2.

ai. "Huminik/Schuler matter" Aplt. App., 130, 146, column 3, ¶ 2.

aj. "If the SEC didn't know that the Eleanor Schuler of 1991 was the John Huminik of 1976-and the Amex surely didn't know-there was one possible explanation. The Central registry of the National Association of Securities Dealers . . . has John Huminik on its data base. And Eleanor Schuler too." Aplt. App., 130, 146, column 3, ¶ 3.

ak. "But they are listed as two separate people, with one `incident' to his name and one to hers." Aplt. App., 130, 146, column 3, ¶ 3.

al. "A NASD spokesman notes that more detailed information, such as social security numbers, is only maintained for NASD members-not corporate officers who fall afoul of the SEC." Aplt. App., 130, 146, column 3, ¶ 3.

am. "But the Printron disaster and the miserable performance of the other ECM companies make it plain that the Amex hasn't gone far enough." Aplt. App., 130-31, 147, column 1, ¶ 4.

V. SUMMARY OF ARGUMENT

For over one thousand years, a person's good name and reputation have been recognized as important interests requiring legal protection. L. Eldridge, The Law of Defamation § 53, pp. 293-294 (1978). Schuler's right to protect her own good name and reputation "from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966). This right is "a basic of our constitutional system[]" and is entitled to equal recognition by the court. Id. Private persons, such as Schuler, are more vulnerable to injuries caused by defamation and also are more deserving of recovery. Id. at 93-94. Gertz v. Welch, Inc.. 418 U.S. 323, 344 (1974).

The trial court failed to give equal import and deference to laws meant to protect Schuler's reputation, when it reviewed the article's statements individually and the article as a whole. When properly viewed, Schuler's Amended Complaint adequately states claims and causes of action for defamation, false light invasion of privacy, intentional infliction of emotional distress, interference with contractual relations, and interference

with prospective advantage. Aplt. App., 125-153, 1-17. McGraw-Hill's tortious statements irreparably damaged Schuler's business and private life. Under these circumstances, the trial court's summary dismissal of Schuler's Amended Complaint was highly improper and should be reversed on appeal.

VI. ARGUMENT

A. APPELLATE REVIEW STANDARD

In reviewing the trial court's grant of McGraw-Hill's second Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), the appellate court reviews the trial court's decision "de novo." Jojola v. Chavez, 55 F.3d 488, 490 (10th Cir. 1995); Gagan v. Norton, 35 F.3d 1473, 1474 n.1 (10th Cir. 1994), cert. denied, 115 S. Ct. 1175 (1995). The appellate court must accept as true, all well pleaded allegations of the complaint and "construe them in the light most favorable to the plaintiff." Id.; Gagan, id. (quoting Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991)). Dismissal is only proper when a plaintiff can prove no set of facts to support a claim for relief. Jojola, id.; Noland v. McAdoo, 39 F.3d 269, 273 (10th Cir. 1994).

B. THE TRIAL COURT ERRED BY GRANTING MCGRAW-HILL'S MOTION TO DISMISS

Despite long standing historical interest in protecting Schuler's reputation and good name, the trial court failed to adhere to the applicable standard of review favoring Schuler. Instead, the trial court viewed the pleadings to Schuler's detriment and failed to fairly and objectively evaluate the allegations of her Complaint and Amended Complaint. For

reasons discussed below, the trial court's error should be corrected on appeal and its decision should be reversed.

1. THE TRIAL COURT FAILED TO VIEW THE PLEADINGS, AS TRUE, IN FAVOR OF SCHULER

(a) Trial Court's Obligation

In deciding McGraw-Hill's Motion to Dismiss, the trial court was obligated to accept as true all well pleaded allegations in the complaint and to construe them in the light most favorable to Schuler. Innovative Digital Equip., Inc. v. Quantum Tech., Inc., 597 F. Supp. 983, 988 (N.D. Ohio 1984). Also, the trial court was obligated to deny McGraw-Hill's Motion if any legal theory existed for recovery. The trial court should not have granted McGraw-Hill's Motion absent a finding, beyond doubt, that Schuler could prove no set of facts that would entitle her to judgment. See Lafoy v. HMO Colorado, 988 F.2d 97, 98 (10th Cir. 1993). The trial court erred by failing to adhere to the above requirements in deciding McGraw-Hill's Motion and its decision should be reversed.

2. SCHULER STATED A VALID CLAIM FOR DEFAMATION

(a) Defamation Elements

To prove her defamation claim, Schuler is required to show that McGraw-Hill published a false statement of fact, concerning Schuler, which was defamatory, was understood to be defamatory by the recipients of the statement, and which caused actual injury to Schuler's reputation. Schuler also must show that McGraw-Hill either knew the communication was

false or negligently failed to recognize that it was false or acted with malice. N.M. UJI § 13-1002 to 13-1011 (1997).

In determining whether a communication is or contains a statement of "fact" or "opinion," the fact finder must consider: "(A) The entirety of the communication and the context in which the communication was made; and (B) whether reasonable persons would be likely to understand the communication to be a statement of the defendant's opinion or a statement of fact." Id. at § 13-1004. "[A]n opinion which implies that it is based upon the existence of undisclosed facts is the same as a statement of fact." Id. Where a statement alleged to be defamatory can be interpreted as either fact or opinion, and the court cannot rule that, as a matter of law, the statement was not understood as fact, "there is a triable issue of fact for the jury.'" Marchiondo v. Brown, 98 N.M. 394, 404, 649 P.2d 462, 472 (1982) (quoting Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, 39, cert. denied, 444 U.S. 984 (1979)). Likewise, statements purporting to be opinions often are understood to be factual statements. See Marchiondo, 98 N.M. at 401, 649 P.2d at 469. "[W]here there are implications in the statement "that the writer has private, underlying knowledge to substantiate his comments about plaintiff," and such knowledge implies the existence of defamatory facts, the statement is deemed to be factual and not privileged. Kutz v. Independent Pub. Co., Inc., 97 N.M. 243, 246, 638 P.2d 1088, 1091 (Ct. App. 1981). In determining whether a statement is "of and concerning" a person, the statement's substance, as opposed to its form is critical. See Rosenblatt, 383 U.S. at 86; New York Times Co. v. Sullivan, 376 U.S. 254, 288 (1964).

(b) McGraw-Hill's Article Defamed Schuler

Schuler's Amended Complaint and Response identified numerous statements made by McGraw-Hill in its Business Week article. Aplt. App., 125-153; 182-209. The defamatory statements included the items listed in Section IV (D) herein lettered as b, f, h, i, k, n, s, t, u, v, w, z, ac, ad, ae, af, ag, ai, and ak. These defamatory statements are discussed below.

b. Photograph caption "CHANGE SEX, CHANGE THE PAST: BEFORE BECOMING PRINTRON CEO AS ELEANOR SCHULER, JOHN HUMINIK, JR. RAN TWO COMPANIES THE SEC ACCUSED OF FRAUD. WHO KNEW?" (Aplt. App., 143, column 2, top.).

The statement "CHANGE SEX, CHANGE THE PAST" appeared in the top center of Business Week's index; prominently displayed to readers. Aplt. App. 143, column 2, top. This phrase stated as a fact that Schuler was able to change her past business and other history as a man, by changing her sex. When viewed in the context of the entire sentence, the statement further implied that Schuler had some evil motive that either required or contributed to her decision to change her sex.

McGraw-Hill's article also included the following related statements regarding the SEC's knowledge or lack of knowledge of Schuler's past:

> Before becoming Eleanor Schuler, John Huminik Jr. ran two companies that the SEC accused of fraud. Later, she signed another consent decree. The SEC may have thought they were two separate people. Aplt. App., 144, highlighted box.
>
> The SEC's mild treatment of Schuler in 1991 raises yet another issue: Did the SEC know in 1991 that Schuler was Huminik? Aplt. App., 146, column 3, ¶ 2.

Before the trial court, McGraw-Hill also argued that the SEC's lack of knowledge of the two consents may be explained due to the organization of computerized judicial databases by caption. Aplt. App., 212.

McGraw-Hill's above statements that the Securities and Exchange Commission (SEC) did not know, or may not have known, that Schuler was the signatory on a 1976 consent and a 1991 consent are statements of fact capable of being proved or disproved. Schuler signed both consents after her sex change and under her current name. Aplt. App., 185, 207-209. Nevertheless, Schuler had no duty to disclose the prior consent or her sex change beyond a five (5) year period. See 17 C.F.R. 11 § 229.401(f).

Schuler asserts that the SEC knew she signed both consents and that McGraw-Hill's statements are false. Her assertions must be viewed as true for purposes of appeal.

The statement "CHANGE SEX, CHANGE THE PAST" was not a question. No question mark follows the statement and an ordinary person would not read it as such. A question mark did appear following the phrase "WHO KNEW?" That phrase, when viewed in the context of the preceding sentence,

confirmed that Schuler changed her known history as a man by changing her sex to female. It further implied that Schuler's sex change effectively deceived others with whom she had business dealings.

Further, the statement, when viewed in context, implied that it was based on undisclosed facts or sources, likely including SEC personnel. Thus, the statement was not an opinion.

Also, the above statement was not a harmless "tag line." As noted above, the statement attributed to Schuler improper motives and painted her as deceptive, dishonest, and immoral, particularly when viewed in the context of the entire article. A fair reading of Schuler's Amended Complaint and Response reveals that she has sufficiently alleged that the above statement is defamatory and the trial court erred in concluding otherwise.

f. "But she didn't like to talk about that." Aplt. App., 144, column 1, ¶ 3.

This sentence, particularly when viewed in the context of the entire article, stated as a fact that Schuler did not like to talk about her former work with the Federal Bureau of Investigation (FBI). Aplt. App., 144, column 1, ¶ 3. This statement can be proven or disproven by testimony from Schuler and other persons with whom she has discussed her FBI work, and by other evidence. Schuler claims that the statement is false. The inclusion or exclusion of details of Schuler's FBI work in the context of her business dealings, does not indicate that she did not like to talk about her FBI work and does not negate the falsity of that statement.

In the subject article McGraw-Hill portrayed Schuler as a deceptive and secretive person who sought to conceal information about her past. Aplt. App., 143-153, 185, 197-98. This statement, in conjunction with the remainder of the article, serves to reinforce McGraw-Hill's false portrayal of Schuler as deceptive and subjects her to public contempt and hatred or contempt or ridicule in public estimation. See Andrews v. Stallings, 119 N.M. 478, 488, 892 P.2d 611, 621 (Ct. App. 1995) (citation and quote marks omitted). Thus, the statement is false and defamatory to Schuler in this context and the trial court erred by finding otherwise.

h. "there was a stain on her record. She had twice been sued in Federal Court by the SEC, twice agreeing to injunctions, without admitting or denying guilt, that prohibited her from violating the securities laws. One of the injunctions was known to the Amex when it approved Printron's listing on the ECM. The other was not." Aplt. App, 144, column 2, ¶ 1.

In the above sentences, the statement "there was a stain on [Schuler's] record[,]" in conjunction with the statement that "[o]ne of the injunctions was known to the Amex . . . [t]he other was not[,]" are defamatory to Schuler. The statement that the Amex did not know about Schuler's consents can be proven or disproven. As noted above, Schuler's consents were a matter of public record available for examination by Amex and any others persons or entities. In the context of the entire article,

McGraw-Hill clearly implied that Schuler deceived the Amex by her sex change. The statement further implied that McGraw-Hill had undisclosed facts, including information regarding Amex's knowledge of Schuler. Therefore, the above statement is false and defamatory to Schuler and the trial court's ruling was in error.

McGraw-Hill's statement was "of and concerning" Schuler. McGraw-Hill did not need to specifically name Schuler because the surrounding circumstances and evidence indicated that the statement focused on Schuler. See Andrews, 119 N.M. at 495, 892 P.2d at 628 (J. Hartz, specially concurring).

In the context of the entire article, the statement clearly indicated that Schuler's deceived the Amex and others through her sex change. Thus, the statement is false and defamatory and Schuler stated a valid claim on this point.

i. "Eleanor Schuler had two records of alleged securities law transgressions-one as a woman, and one as a man. In fact, the name `Eleanor Schuler' was one that she had made up out of thin air." Aplt. App., 144, column 2, ¶ 2.

The statement that Schuler had one record of securities transgressions as a man and one as a woman was false. As stated above, Schuler signed both consents as a female. In the context of this article, the statement was defamatory because it implied that Schuler, through her sex change, wrongfully deceived the SEC into thinking she was two different people or that she received some inappropriate benefit by virtue of the sex

change. Neither item is true. Further, the organization of Schuler's prior consents by one particular database does not render the statement true. The essential "record" is that of the SEC. McGraw-Hill's depiction of Schuler as having two "records" under these circumstances is false and defamatory.

The first statement, when coupled with the statement that Schuler made up her name, leads an ordinary reader to interpret the statements together to mean that Schuler wrongfully deceived others by changing her sex and making up a name. Thus, the statement was defamatory. Whether or not Schuler's current name bears an obvious similarity to her former name, does not indicate that the name was manufactured out of "thin air." The origin and basis for Schuler's name are matters susceptible of being proven or disproven, and are matters of fact. The trial court erred by finding otherwise.

k. "Her earlier SEC record, and her change in gender were concealed by Printron not only from Barnes but from the Amex' `blue ribbon' panel of Wall Street notables that had handpicked the 23 ECM companies. Schuler also hid her previous identity, and the injunction, from securities regulators in New [Y]ork, in a `sunshine law' filing 14 months before the day the balloons fell on the Amex floor (box)." Aplt. App., 128, 145, column 2, ¶ 2-column 3, ¶ 1.

The first statement regarding concealment by Printron included a reference "of and concerning" Schuler. At the time the article was published, Schuler was a prominent corporate officer of Printron and as such, her duties included dealing with securities filings, investors, and the Amex. Schuler's had an inseparable relationship with Printron, particularly as discussed in the context of the article. The article's central focus was on Schuler's veracity and truthfulness, and how she applied those negative qualities while working at Printron. Under these circumstances, the statement falsely portrayed Schuler as untruthful and deceptive in her business dealings, particularly her dealings with the SEC. The statement is false and it can be proven or disproven whether Schuler's prior identity was hidden from key business persons and entities. Thus, it is a false statement of fact which forms the basis of a defamation claim.

Likewise, the statement that Schuler herself "hid" her prior identity is a false factual statement. The New York Sunshine Law referenced in the article can be interpreted in any number of ways, and for purposes of appeal, it must be interpreted in the light most favorable to Schuler. The New York Sunshine Law cited in the article asks "Has registrant, any officer, director, or principal or partner . . . ever used or been known by any other name?" Aplt. App., 145, columns 1 and 3, highlighted box. This question, when viewed in context, may be interpreted to refer to names used while a corporate representative or to names used while filing under New York's Sunshine Law. The trial court's interpretation of the meaning and significance of this question and answer, contrary to Schuler's favor, was error. Whether Schuler "hid" her identity from New York entities is a matter of fact which can be proven or disproven. McGraw-Hill's statement defamed Schuler by again portraying her as deceptive and untruthful. The trial court erred by ruling otherwise.

n. "Schuler/Huminik affair[]" Aplt. App., 128, 145, column 1, ¶ 1.

ac. "the next Huminik/Schuler exploit" Aplt. App., 129, 146, column, 1, ¶ 4.

ai. "Huminik/Schuler matter" Aplt. App., 130, 146, column 3, ¶ 2.

All of the above statements, particularly when viewed in the context of the entire article, reinforced McGraw-Hill's portrait of Schuler as a deceitful, conniving person who's goal was to hide her prior identity and/or to confuse those with whom she conducted business. These images of Schuler were not true and are defamatory to her in this context.

s. "As recounted in his slickly written 1967 book[]" Aplt. App., 128, 145, column 3, ¶ 4.

McGraw-Hill's statement that Schuler book's was "slickly written" falsely implied that Schuler used false and deceptive practices in her personal and business dealings. As noted above, the whole premise of the article is that Schuler actively deceived those with whom she conducted business. In this context, the statement was untrue and defamatory to Schuler.

t. "Neither the book nor the double agent career were mentioned in any of Printron's filings with investors and regulators." Aplt. App., 128-29, 145, column 3, ¶ 5.

This statement falsely implied that Schuler actively concealed her prior identity from Printron's "investors and regulators," despite a duty to do so. The implication is false. As noted above, Schuler had no duty to disclose this information. The statement is "of and concerning" Schuler because of her prominent and integral position with Printron. Whether or not the items were disclosed, does not change the negative and defamatory implication of the statement. Defamatory implications are actionable, and this statement falls into that category. The trial court erred by finding that this statement did not support a defamation claim.

u. "[']We have nothing against transsexuals[']" Aplt. App., 129, 146, column 1, ¶ 1.

The above statement, when taken in the context of the entire article, falsely implied that Schuler's transsexual status rendered her deceptive and unworthy of trust. The inclusion of the statement in the article serves no purpose other than to reinforce in the reader's mind the illusion that Schuler was someone evil to be held in contempt. In the context of this article, the statement is not protected opinion and forms the basis of a defamation claim.

v. "At issue is not her sex change, but rather the extent to which her concealment of that change masked other things." Aplt. App., 129, 146, column 1, ¶ 1.

This statement is similar to statement k above, in that it accused Schuler of concealing her prior identity. As noted above, Schuler did not conceal her identity from her business contacts. The trial court's cursory treatment of this issue in its opinion and its failure to view the statement in the manner most favorable to Schuler constituted reversible error.

w. "The trouble . . . arises whenever Schuler's pre-Schuler activities are mentioned in Printron's public disclosures. Time after time, they refer to Schuler as a `she'- even when discussing positions held when Schuler was a `he.'" Aplt. App., 129, 146, column 1, ¶ 2.

Again, this statement was "of and concerning" Schuler due to her status with Printron. The statement falsely implied that Schuler's corporate disclosures were deceptive and that Schuler was responsible for the deception. Schuler's past business experience was listed on corporate disclosures. The effect of the statements on an ordinary reader is a matter subject to proof at trial. A fair reading of the statements supports the view that they are defamatory to Schuler. McGraw-Hill's mischaracterization of Schuler's history was untruthful and only served to reinforce the article's premise that Schuler was a deceptive and untruthful person. The trial court failed to view this statement and the allegations of Schuler's Amended Complaint in the light most favorable to Schuler and its decision should be reversed.

z. "Was Schuler being shy-or was she improperly misleading investors?" Aplt. App., 129, 146, column 1, ¶ 4.

The above statement of fact was disguised as a question. However, under these circumstances the statement is reasonably interpreted as falsely implying that Schuler, in fact, mislead investors. Further, the statement implied that McGraw-Hill had undisclosed facts supporting its view that Schuler misled investors. The implication of McGraw-Hill's statement was improper and supports Schuler's defamation claim, particularly when the statement is viewed in the context of the entire article.

ad. "John Huminik was no longer exhibiting a James Bond persona. `Marine blue shadow haloes the eyelids,' . . . The Post went on to describe the sex change and, in graphic detail . . . None of this would amount to a hill of beans if Eleanor Schuler, as Printron CEO, hadn't fallen afoul of the SEC." Aplt. App., 129-30, 146, column 1, ¶ 5.

The statement that "as Printron CEO," Schuler "f[e]ll afoul of the SEC" was false and misleading. The statements falsely implied that McGraw-Hill had undisclosed facts evidencing some wrongdoing by Schuler while she was a Printron officer. It is a matter of fact, which can be proven or disproven, whether Schuler violated SEC laws while at Printron. The trial court's conclusion that the true facts are "irrelevant"

was in direct violation of its duty to view the facts in Schuler's favor. The trial court's decision should be corrected on appeal.

> ae. "The Huber-Schuler ties were shrugged off by the blue-ribbon panel. `We were assured by the Amex staff that the issue had been resolved[.]'" Aplt. App., 130, 146, column 2, ¶ 2 - column 3, ¶ 1.

This statement falsely implied that Huber and Schuler had "ties," including acting in concert to defraud investors and/or deceive others. In the context of the article, this statement served to ally Schuler with a convicted felon to enhance McGraw-Hill's portrayal of Schuler as a deceptive and untruthful person. An ordinary and reasonable interpretation of this statement, in the context of the entire article, is that Schuler was actively involved with the felon and that it implied the existence of undisclosed facts to that effect. Schuler had no such "ties" with Huber and the statement supports her defamation claim.

> af. "But Hamarat and another former panel member[] . . . now say that the panel didn't know that Eleanor Schuler used to be John Huminik-or that Schuler consented to not one but two injunctions by the SEC. If they had known, they say, Printron's listing would never have been approved."

Aplt. App., 130, 146, column 3, ¶ 1.

In the context of the article, the inclusion of the above statements falsely implied that Schuler hid her prior identity from the SEC and the "blue ribbon" panel. As noted, Schuler's identity was known to the SEC and was available to "blue ribbon' panel members as a public record. McGraw-Hill's inclusion of this statement furthered its own interest in tarnishing Schuler's reputation by painting her as deceitful. The statement also implied that McGraw-Hill had undisclosed facts evidencing lack of knowledge of Schuler's past, on the part of other panel members and Amex representatives. Thus, the statement is not a fair characterization or opinion. The statement is defamatory and Schuler has stated a valid claim.

ag. "The SEC's mild treatment of Schuler in 1991 raises yet another issue: Did the SEC know in 1991 that Schuler was Huminik?" Aplt. App., 130, 146, column 3, ¶ 2.

The statement that the SEC treated Schuler mildly, in conjunction with the query as to the SEC's knowledge of Schuler's prior identity, continued McGraw-Hill's devastating attack on Schuler's reputation. It is a matter of fact, that can be proven or disproven whether the SEC knew of Schuler's prior identity and her consent. The article's repeated assertion that Schuler "hid" her identity, was false, and falsely implied that Schuler was guilty of wrongdoing. Thus, the statement qualifies as actionable under Schuler's defamation claim.

ah. "One explanation might be that the SEC felt so much time had passed that it would not pursue a criminal contempt action against Schuler." Aplt. App., 130, 146, column 3, ¶ 2.

Again, this statement exemplified McGraw-Hill's false accusations that Schuler "hid" her prior identity and consent from the SEC. The statement further implied that Schuler should be subject to criminal penalties for her purported crimes, and the existence of undisclosed facts which would support such criminal sanctions. In this context, the statement is false, defamatory, and actionable by Schuler.

ak. "But they are listed as two separate people, with one `incident' to his name and one to hers." Aplt. App., 130, 146, column 3, ¶ 3.

McGraw-Hill's reference to Schuler's consent records contained in a National Association of Securities Dealers (NASD) database was defamatory in the context of this article. As noted, the article created in its reader's minds the belief that Schuler was a deceptive person who "got away" with wrongdoing, at least for a period of time. A reading of the entire article shows the full extent of the negative and defamatory image created in reader's minds. This statement reinforced that image, falsely, and in a manner that defamed Schuler.

A fair and impartial reading of the above statements, individually and in the context of the entire article, leave the

reader with the clear perception that the article is defamatory to Schuler. The statements do not qualify as "opinion," nor are they harmless word choices. Instead, McGraw-Hill's words were chosen with care to inflict the greatest harm to Schuler's most precious asset, her reputation. Thus, the trial court erred in dismissing Schuler's claims and its ruling should be reversed and corrected on appeal.

3. SCHULER STATED A VALID CLAIM FOR FALSE LIGHT INVASION OF PRIVACY

a. False Light Elements

To establish a claim of false light invasion of privacy, Schuler only is required to show that she was "given unreasonable and highly objectionable publicity that attributes to [her] characteristics, conduct or beliefs that are false, and so is placed before the public in a false position." Restatement (Second) of Torts § 652E cmt. b, at 395. "[A] false light claim may be established where true information is published if the information tends to imply falsehoods. Larsen v. Philadelphia Newspapers, Inc., 375 Pa. Super. 66, 543 A.2d 1181, 1189 (Pa. Super. Ct.), appeals denied, 552 A.2d 251 and 552 A.2d 252 and 552 A.2d 968 (1988), cert. denied, 489 U.S. 1096 (1989). See also Jonap v. Silver, 1 Conn. App. 550, 474 A.2d 800, 806 (Conn. Ct. App. 1984) (jury verdict sustained where there was evidence that defendants caused letter to be published in a magazine that attributed to plaintiff views that were not his own and that there was a major misrepresentation of his character, history, activities, or beliefs).

Further, New Mexico recognizes the tort of defamation by implication in which a "`reputational injury caused by a

communication may result not from what is said but from what is implied.'" Moore v. Sun Publishing Corp., 118 N.M. 375, 381, 881 P.2d 735, 741 (Ct. App.), cert. denied, 118 N.M. 430 (1994) (quoting Rodney A. Smolla, Law of Defamation § 4.05[1], at 4-17 (1994)).

b. McGraw-Hill's Article Placed Schuler in a False Light

The statements outlined by Schuler's Amended Complaint, Response, and in Section IV (D) herein as statement of fact letters a-c, e-i, k, m, t, v-y, and ag, gave Schuler "unreasonable and highly objectionable publicity that attributed to [her] characteristics, conduct or beliefs that were false," and which placed her before the public in a false position. See Restatement (Second) of Torts § 652E cmt. b, at 395. The above statements were made in the context of an internationally circulated "business" periodical, in its "Finance" section. Aplt. App., 144. The article appeared within a "Finance" subsection entitled "Investigations." Id. This context was one in which a reasonable person would expect to find statements of fact and in which reasonable persons would interpret statements as factual. Further, the magazine targeted business professionals and others associated with and/or interested in business matters, such as those with which Schuler was involved. It is in this context that the offending article must be evaluated. Statements supporting Schuler's false light claims are discussed below.

a. Photograph of Plaintiff in black and white in contrast to all other surrounding color photographs, accentuating Ms. Schuler's femininity depicting close up of Plaintiff

in social attire and social setting and pose while other pictures of business people are photographed in professional business attire and professional settings. Aplt. App., 127, 143, column 2.

b. Photograph caption "CHANGE SEX, CHANGE THE PAST: BEFORE BECOMING PRINTRON CEO AS ELEANOR SCHULER, JOHN HUMINIK, JR. RAN TWO COMPANIES THE SEC ACCUSED OF FRAUD. WHO KNEW ?" Aplt. App., 127, 143, column 2.

Statement a. depicted a photograph of Plaintiff in a manner which implied falsehoods. The subject photograph featured a close up shot of Plaintiff in a social setting, set in the top, center of the index, in contrast to surrounding black and white photographs of persons in professional attire and settings. This portrayal of Plaintiff sharply contrasted with the magazine's typical portrayal of business professionals. The caption under the photograph stated "CHANGE SEX, CHANGE THE PAST[.]" Aplt. App., 127; 143 column 2.

When viewed separately and together, the photograph and its caption attributed to Schuler characteristics including deceitfulness, dishonesty, immorality, and untruthfulness, particularly with regard to her business dealings. These

statements further implied that Schuler changed her sex for other than medical reasons, in order to escape or conceal past wrongdoing, and that the authors have knowledge of undisclosed facts supporting such a conclusion. This portrayal of Schuler was highly objectionable and unreasonable, particularly in light of the fact that the article's target audience includes persons with whom Schuler conducts business.

Schuler has affirmatively stated that she changed her sex for medical reasons and her assertion must be taken as true upon review. Whether Schuler changed her sex to obtain some illicit business benefit is a matter of fact which can be proven or disproven by evidence. Therefore, the trial court erred by concluding that these statements did not support a claim for false light invasion of privacy.

As discussed above, McGraw-Hill's characterization of the photograph caption as "a question" is not supported by the evidence or the grammar included in that statement. That statement falsely implied that Schuler, through her sex change, avoided responsibility for any past wrongful acts or omissions. Interpreting both the photograph and its caption in the light most favorable to Schuler, as is required, she has sufficiently plead a false light claim upon which relief can be granted and the trial court's ruling constitutes reversible error.

f. But she didn't like to talk about that." Aplt. App., 127, 144, column 1, ¶ 3.

As noted above, this statement was a false statement of fact. In the context of this article, the statement served to reinforce McGraw-Hill's premise that Schuler was unwilling to talk about her past FBI work and that she was deceptive and

secretive, particularly in business dealings. Schuler's willingness to talk about her past FBI work is a factual matter that can be proven or disproven. McGraw-Hill's false portrait of Schuler is unreasonable and highly objectionable, particularly in light of the fact that she published a book about her experiences as a "double agent" and has had other discussions of her career. Aplt. App., 144, column 1, ¶ 3.

The subject statement attributed to Schuler false characteristics, conduct, and/or beliefs, including that she was unwilling to discuss or acknowledge her past careers, that she attempted to hide or conceal her past, that she was untruthful and deceptive, and that she had good reason to hide her past to avoid responsibility for prior misdeeds. Interpreting this statement in the light most favorable to Schuler, she has sufficiently stated an actionable claim for false light invasion of privacy.

h. "there was a stain on her record. She had twice been sued in Federal Court by the SEC, twice agreeing to injunctions, without admitting or denying guilt, that prohibited her from violating the securities laws. One of the injunctions was known to the Amex when it approved Printron's listing on the ECM. The other was not." Aplt. App, 127, 144, column 2, ¶ 1.

k. "Her earlier SEC record, and her change in gender were

concealed by Printron not only from Barnes but from the Amex' `blue ribbon' panel of Wall Street notables that had handpicked the 23 ECM companies. Schuler also hid her previous identity, and the injunction, from securities regulators in New [Y]ork, in a 'sunshine law' filing 14 months before the day the balloons fell on the Amex floor (box)." Aplt. App., 128, 145, column 2, ¶ 2-column 3, ¶ 1.

t. "Neither the book nor the double agent career were mentioned in any of Printron's filings with investors and regulators." Aplt. App., 128-29, 145, column 3, ¶ 5.

w. "The trouble . . . arises whenever Schuler's pre-Schuler activities are mentioned in Printron's public disclosures. Time after time, they refer to Schuler as a `she'- even when discussing positions held when Schuler was a `he.'" Aplt. App., 129, 146, column 1, ¶ 2.

All of the above statements falsely implied that Schuler had a duty to disclose the referenced information and that she failed to do so, when in fact no such duty existed. Specifically, each of these statements falsely implied that Schuler "hid" her prior identity from the SEC, investors, and the Amex. Even if Schuler did not disclose such information, she was not required to do so, and the statements' implication that she had a duty to do so is false and creates the false impression that Schuler was deceptive. Thus, the statements are actionable under false light invasion of privacy theories and the trial court erred by dismissing Schuler's false light claims.

i. "Eleanor Schuler had two records of alleged securities law transgressions-one as a woman, and one as a man. In fact, the name `Eleanor Schuler' was one that she had made up out of thin air." Aplt. App., 127-28, 144, column 2, ¶ 2.

The article's statement that "[i]n fact, the name `Eleanor Schuler' was one that she had made up out of thin air[,]" placed Schuler in a false light by stating as a fact that the name was "made up," and by further implying that the name was "made up" for fraudulent or deceptive purposes. Aplt. App., 127-28; 144, column 2, ¶ 2. The true origin of Schuler's name, can be proven at trial and the name change was critical to her successful sex transformation. The falsity of this statement, combined with the false implications it raised in the context of this article, make the statement actionable under a false light invasion of privacy theory. The trial court's erroneous dismissal of this claim should be corrected on appeal.

v. "At issue is not her sex change, but rather the extent to which her concealment of that change masked other things." Aplt. App., 129, 146, column 1, ¶ 1.

McGraw-Hill's above statement falsely implied that Schuler concealed her sex change from business associates and, further implied, that she did so in order to "mask" or "conceal" wrongdoing. Aplt. App., 129; 146, column 1, ¶ 1. In accordance with the other statements referenced in this section, this statement placed Schuler in a false light by unreasonably and in a highly objectionable manner attributing to her characteristics, belief, and/or conduct including deception, dishonesty, and other misdeeds. Schuler sufficiently stated a claim for false light on this point, and the trial court's decision was error.

x. "Moreover, the filings say that Schuler was a `self-employed technology and corporate consultant' from 1966 to 1991. In fact, Schuler, as Huminik, was president of General Industrial Corp. and General Enterprises Corp., which allegedly defrauded investors during the 1970s." Aplt. App., 129, 146, column 1, ¶¶ 2-3.

The above statements falsely implied that Schuler's description of her past employment included in the "filings" was deceptive. Thus, this statement placed Schuler in a false light by

attributing to her false characteristics and conduct, including deception, dishonesty, and an intent to defraud company investors and others. Schuler's claims in this regard sufficiently state a claim for false light invasion of privacy.

ag. "The SEC's mild treatment of Schuler in 1991 raises yet another issue: Did the SEC know in 1991 that Schuler was Huminik?" Aplt. App., 130, 146, column 3, ¶ 2.

The last sentence of this statement falsely implied that the SEC did not know that Schuler was Huminik, and thus, that Schuler was deceitful, dishonest, and deceptive with regard to the SEC and her business dealings. As discussed above, the SEC did know that Schuler was Huminik as evidenced by the nature of her signature on the 1976 consent, which stated "John Huminik, Jr., now known as Eleanor L. Schuler[.]" Aplt. App., 207-209.

McGraw-Hill's statement in the context of this article, placed Schuler in a false light before the public by stating as a fact and by implying that she deceived the SEC by hiding her prior gender change and her prior SEC consent, and further, that she did so to further her own devious ends. This statement is sufficient to form the basis of a false light invasion of privacy action, particularly at this stage of proceedings and the trial court should be reversed on this point.

When read as a whole, the article falsely implied that Schuler was deceptive, dishonest, and disreputable in business matters and that she committed "offensive" and "illegal" acts. The statements cited in this section, read together with those

referenced in the Amended Complaint and in the context of the entire article, sufficiently state a claim for false light invasion of privacy. Therefore, Schuler's claims should reinstated on appeal and she should be allowed to pursue her claims, seek proper discovery of supporting evidence, and present her claims to an impartial fact finder.

4. SCHULER STATED A VALID CLAIM FOR PUBLICATION OF PRIVATE FACTS INVASION OF PRIVACY

(a) Elements of Claim for Publication of Private Facts

An invasion of privacy through publication of private facts occurs when one publicizes a matter concerning a person's private life, which publicity is of a kind that: a) would be highly offensive to a reasonable person; and b) is not of legitimate public concern. Moore, 77 N.M. at 383. See also Restatement (Second) of Torts § 652 D at 383. Schuler's Amended Complaint sufficiently stated a claim for this cause of action.

(b) McGraw-Hill Published Private Facts About Schuler, Invading her Privacy

McGraw-Hill's article included over twenty (20) references to Schuler's sex, gender, and name change, and sex change. Aplt. App., 127-130, 143-153; Section IV (D) herein, Statement of Fact letters b, j, k, m, q, u, v, w, aa, ad, af, and aj. The repeated reference to Schuler's sex and name change, in the context of this article, are of a type that would be highly offensive to a reasonable person and are of no legitimate public concern.

As stated above, the article appeared in an international business publication directed to business professionals, including Schuler's current and potential business associates. The article purported to be about the Amex's Emerging Company Marketplace (ECM). However, a reading of the entire article reveals that instead, its focus is on Schuler's sexual history, her alleged concealment of that history for illicit purposes, and her deceptive behavior in business matters. Aplt. App., 143-153.

While Schuler's sex change was not concealed from her business associates, nor was it publicized to them, since it was ancient history. Schuler's sex change occurred in the 1970s, approximately two decades before this article appeared in Business Week magazine. Schuler's Amended Complaint included the allegation that these private facts were not "public" in the context of her business dealings.

At this stage of proceedings, the trial court was obligated to accept Schuler's assertions as true. Instead, the trial court erred by usurping the jury's role of determining whether Schuler had proven this claim. Thus, the trial court's decision should be reversed on appeal.

5. SCHULER STATED A VALID CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

(a) Elements of Intentional Infliction of Emotional Distress

In order to state a claim for intentional infliction of emotional distress Schuler must show that McGraw-Hill's conduct was extreme, outrageous, and done intentionally or recklessly causing her severe emotional distress. See Hakkila v.

Hakkila, 112 N.M. 172, 175, 812 P.2d 1320, 1323 (Ct. App. 1991). The statements referenced in McGraw-Hill's article and the article as a whole, establish a claim for intentional infliction of emotional distress.

(b) McGraw-Hill Intentionally Inflicted Emotional Distress Upon Schuler

In the offending article, McGraw-Hill repeatedly portrayed Schuler as deceptive and untruthful, it included false statements (blatant and implicit), it included statements that Schuler's name and sex change were unknown to the SEC and her business associates, and made other such references throughout as discussed herein. McGraw-Hill's conduct constitutes exactly the type of outrageous conduct that this tort was meant to address.

A fair and impartial reading of the entire offending article evidences the devastating nature of its impact on Schuler and the cavalier attitude with which McGraw-Hill decimated Schuler's career, business, and personal relationships. Under these facts, Schuler sufficiently stated a claim for intentional infliction of emotional distress and the trial court's dismissal of this claim should be reversed on appeal.

6. SCHULER STATED A VALID CLAIM FOR INTERFERENCE WITH CONTRACTUAL RELATIONS/ PROSPECTIVE ADVANTAGE

(a) Elements of Interference with Contractual Relations/Prospective Advantage

"The tort of interference with existing or prospective contractual relations requires proof of: 1) a contract or prospective contractual relation; 2) defendant's knowledge of the contractual relation; 3) intentional and improper interference, which means either (a) improper motive solely to harm plaintiff, or (b) an improper means; and, 4) pecuniary harm caused by the interference." Leyba v. Renger, 874 F. Supp. 1218, 1225 (1994) (citing Dough v. Adventist Health Systs., Inc., 108 N.M. 801, 806, 780 P.2d 627, 632 (1989)).

(b) McGraw-Hill Interfered with Schuler's Contractual Relationships and Prospective Advantage

Schuler's Amended Complaint included allegations that McGraw-Hill, through its article, tortiously interfered with Schuler's current and potential business relationships by making false and defamatory statements about her and by doing so intentionally or with reckless disregard and by improper means or motive. These allegations must be taken as true at this stage of the proceedings.

As noted above, McGraw-Hill's article included numerous false and defamatory statements and other wrongful items with regard to Schuler. A reading of the entire article, forces the reader to believe that Schuler was deceptive and untrustworthy, particularly with regard to business matters. Such a portrayal was false and devastating to Schuler's credibility, reputation, and her ability to succeed or to maintain her business status.

Again the trial court attempted to decide matters of proof of this cause of action, instead of the sufficiency of the claim itself. That was not the trial court's role. Schuler

sufficiently alleged causes of action including defamation, invasion of privacy, intentional infliction of emotional distress an interference with contractual relations and prospective advantage. This cause of action also has been alleged sufficiently to withstand McGraw-Hill's Motion and the trial court's ruling should be reversed on appeal.

VII. CONCLUSION

At all stages of this litigation, the trial court unjustly subordinated Schuler's fundamental interest in preserving her reputation and good name, to the malicious self-serving interests of McGraw-Hill and the media. The law does not permit the trial court to adopt such a prejudicial and biased position in evaluating the sufficiency of Schuler's claims.

The trial court failed to view Schuler's claims in the light most favorable to her. The trial court also erred by attempting to decide the merits of Schuler's causes of action, instead of the sufficiency of the allegations themselves.

The trial court's failure to view McGraw-Hill's article, in whole and the separate statements contained therein, as including actionable false statements of fact was reversible error. Viewed in accordance with legal standards, Schuler's Amended Complaint sufficiently stated the causes of action alleged. Once the article's statements are viewed fairly and impartially, in Schuler's favor as the law dictates, it is the jury's role to determine whether Schuler has proven her claims. At this stage of proceedings, proof of Schuler's claims is not at issue. Especially in this situation, when Schuler has not had the benefit of any discovery. For reasons stated above, the trial court committed reversible error by dismissing Schuler's Amended Complaint and its decision should be reversed on appeal.

(The above issues were preserved for appeal at Aplt. App., 125-153, 182-209.).

WHEREFORE, for the foregoing reasons, Schuler respectfully requests that the Court enter an Order reversing the District Court's grant of McGraw-Hill's Motion to Dismiss and mandating that the trial court present this case to a jury for a decision on the merits. Also, Schuler requests that the Court grant her attorney fees, costs, and such other relief the Court deems proper.

STATEMENT REGARDING ORAL ARGUMENT

Schuler requests oral argument.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed or delivered to all those entitled to notice on 8th or 9th day of September, 1997.

/s/

Eleanor Schuler
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APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELEANOR SCHULER,

Plaintiff/Appellant,

v.

No. 97-2225
(Filed October 27, 1997)

THE MCGRAW-HILL COMPANIES, INC., including BUSINESS WEEK, an unincorporated division or subsidiary of THE MCGRAW-HILL COMPANIES, INC., a New York Corporation, BUSINESS WEEK ONLINE, GARY WEISS, individually and as employee of THE MCGRAW-HILL COMPANIES, INC.,and MICHAEL SCHROEDER, individually and as employee of THE MCGRAW-HILL COMPANIES, INC.,

Defendants/Appellees.

On Appeal from the United States District Court
for the District of New Mexico

The Honorable Santiago Campos
District Judge

D.C. No. CIV 96-0292 SC/RLP

APPELLANT'S REPLY BRIEF

Respectfully submitted,
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Pro Se for Plaintiff/Appellant

STATEMENT REGARDING ORAL ARGUMENT

Appellant desires oral argument.

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THERE ARE NO PRIOR OR RELATED APPEALS IN THIS CASE

II. STATEMENT OF THE CASE

The McGraw-Hill Companies Inc.'s (McGraw-Hill) comments regarding Schuler's Motion for Remand to State Court (Remand Motion) falsely imply improper motives on the part of Schuler or her representatives. McGraw-Hill's comments in this vein, are a last ditch attempt to misdirect the Court's attention to irrelevant non-issues.

Schuler's attempt to have the case heard in a state forum, was entirely valid given the state issues involved. Aplt. App., 72-85, 102-111. The legal argument based on the amount in controversy was proper given the requirement that removal be determined by reference to pleadings at the time of removal. State of Texas v. Alliance Employer Leasing Corp., 797 F. Supp. 542, 544 (N.D. Tex. 1992); Aplt. App., 78. McGraw-Hill's insinuation to the contrary is a shallow attempt to prejudice this Court against Schuler.

Likewise, McGraw-Hill falsely stated that Schuler "threatened to divest the [federal district] court of jurisdiction by dismissing the removed action . . . and [fraudulently joining] a token in-state defendant." A rational reading of Schuler's Remand Motion and supporting documents shows that she never made any such threat. Aplt. App., 72-85, 102-111. Instead, Schuler stated that additional state defendants may be added to the suit. The addition of state defendants to a case does not make the addition "fraudulent." The addition of such defendants still is a possibility since discovery has not occurred in this case and other potential defendants may be revealed. McGraw-Hill's desperate attempt to further stain Schuler's reputation by falsely characterizing her Remand Motion as a "threat," exemplifies the wanton disregard with which it has conducted itself with regard to Schuler's reputation. The Court

should ignore McGraw-Hill's false and inflammatory comments on this matter and focus on the big picture; the article which is the subject of this appeal.

Further, Schuler takes exception to McGraw-Hill's rendition of allegedly undisputed facts. Appellee's Answer Brief, 3-5. Schuler's pleadings are replete with statements and supporting documents showing that the article as a whole was defamatory, invaded her privacy and was injurious to her business and personal endeavors. After all, this was not a mere paragraph in some gossip column. It was a major tabloid style, four (4) page purported investigative expose in a first class business magazine. Aplt. App., 143-147. Further, it was electronically published on the "world wide web" where it remains accessible to anyone with a modem. Aplt. App., 148-153.

McGraw-Hill's characterization of portions of the article, taken out of context, do not change the nature of the offending article and certainly do not change the requirement that the article be viewed as whole. N.M. UJI § 13-1004 (1997). Thus, its alleged facts are irrelevant to determining this appeal.

III. SUMMARY OF THE ARGUMENT

Contrary to McGraw-Hill's assertions, the subject article was a prime example of tabloid style journalism. It has all the elements: 1) it focused on Schuler, a corporate executive who has lived an interesting and varied lifestyle which included dangerous FBI counterspy work and a sex change operation; 2) it sensationalized her lifestyle and her role in various companies and capacities in which she was employed; 3) it included unsupported allegations of Schuler's corporate and personal

impropriety and criminal behavior; and 4) it falsely led readers to believe that Schuler used deception and her sex change to "get away" with improper actions. Aplt. App., 143-153.

Such behavior should not be allowed to stand under the guise of freedom of speech. Freedom of speech is limited, and for good reason. The recent tabloid exploits regarding Princess Diana of Wales, exemplify the press's irresponsible attitude and excesses toward individuals and their privacy rights. Christopher Burns, Princess Diana Dies After Paris Crash: Boyfriend Killed in Accident After Chase by Paparazzi, Albuquerque Journal, August 31, 1997, at A1, A10. At the time of this article, Schuler had been a private person for about fifteen (15) years. This time span is equivalent to the time between which one enters kindergarten and then graduates from high school; a great span of the calendar. Prior to that time, at most she was a limited purpose public figure. See Little v. Breland, 93 F.3d 755, 767 (11th Cir. 1996).

McGraw-Hill's vain attempt to trivialize the offending nature of its article and its refusal to acknowledge the limitations of the press, does not change the defamatory and offensive nature of the article. A person's reputation is a product of labor; the very essence of a person's being. It is a precious and irreplaceable commodity. Property is most sacred or liberty cannot exist. So too, such reputation can be murdered when a publication uses the pen as a swift and sharp sword. McGraw-Hill's wanton destruction of such a commodity for mere profit is contemptible and its vile behavior should be redressed by the courts for the benefit of Schuler and any other unsuspecting persons who would be its next target.

A fair reading of the entire article, leaves the reader with a clear and certain understanding that Schuler has acted and

continues to act disreputably in her business and personal dealings. Especially in view of the fact that Schuler has no criminal record and never has been arrested. This characterization of Schuler was false and defamatory, cast her in a false light before the public, and disclosed her medical history, which was of no concern to the public. The right to trial by jury is inviolate and is guaranteed by the United States Constitution. U.S. Const. amend. VII. Schuler is here pounding on the doors of justice to exercise her right to a jury trial. She is entitled to pursue this action and to present it to a jury for trial.

IV. SCHULER'S RIGHT TO PROTECT HER REPUTATION IS ENTITLED TO EQUAL CONSTITUTIONAL PROTECTION

McGraw-Hill would have this Court believe that the only interest worth protecting is freedom of speech. However, much to its dismay, the United States Constitution did not limit itself to protecting that interest. Schuler's right to protect her reputation is **equally** recognized by the courts and **equally** entitled to constitutional protection. L. Eldridge, The Law of Defamation § 53, pp. 293-294 (1978); Rosenblatt v. Baer, 383 U.S. 75, 92 (1966).

Schuler's Amended Complaint sufficiently states causes of action for defamation, false light invasion of privacy, intentional infliction of emotional distress, interference with contractual relations, and interference with prospective advantage. Aplt. App., 125-153, 1-17. When considering Schuler's claims, it is imperative that the Court view the offending article as a whole and in context. When viewed in that light, it is obvious that the trial court erred by failing to deny McGraw-Hill's Motion to Dismiss (Motion) and by failing

to give equal credence to Schuler's claims and interests in this case.

V. STANDARD OF REVIEW

McGraw-Hill's suggestion that Schuler's Amended Complaint must be read in favor of freedom of the press is ludicrous and lacks authoritative support. A plain and lucid reading of the subject article as a whole, the Amended Complaint, and supporting pleadings reveals that Schuler's statement of her claims clearly is adequate to overcome the Motion to Dismiss in this case. Even if the Court views the pleadings under a "somewhat stricter standard," it still must view the article as a whole and the pleadings in Schuler's favor. N.M. UJI § 13-1004.

VI. SCHULER'S AMENDED COMPLAINT STATED A VALID CLAIM FOR DEFAMATION

The statements referenced in Schuler's Brief in Chief, taken together with the article as a whole, were defamatory. The district court erred in finding otherwise. The subject statements are referenced below, designated according to the letter used in Schuler's Amended Complaint.

b. **Photograph caption "CHANGE SEX, CHANGE THE PAST: BEFORE BECOMING PRINTRON CEO AS ELEANOR SCHULER, JOHN HUMINIK, JR. RAN TWO COMPANIES THE SEC ACCUSED OF FRAUD. WHO KNEW ?"** (Aplt. App., 143, column 2, top.).

The prominent and strategic position of the false factual statement "CHANGE SEX, CHANGE THE PAST" in the center of Business Week's index, especially when viewed in the context of the entire article, furthered McGraw-Hill's premise that Schuler deceptively hid her identity for illicit reasons. A plain and common sense reading of this statement reveals it to be one of fact and not merely a "shorthand reference." Indeed, the statement sets the tone for the entire article.

McGraw-Hill's related statements regarding the SEC's knowledge or lack of knowledge of Schuler's past likewise mischaracterized Schuler's relationship and candor with the Securities Exchange Commission (SEC). McGraw-Hill's statements concerning the SEC's knowledge that she signed two consent decrees and whether the SEC treated her "mildly" as a result, are factual matters capable of proof at trial. Aplt. App., 144, highlighted box; Aplt. App., 146, column 3, ¶ 2. As noted in the Brief in Chief, Schuler signed both consents after her medical sex change and under her current name. Aplt. App., 185, 207-209. Also, she had no duty to disclose the prior consent beyond a five (5) year period. See 17 C.F.R. 11 § 229.401(f). (1993). Also, she had no duty whatsoever to disclose her medical history. McGraw-Hill's claim that the nature of these factual statements somehow can be magically transformed into opinion due to the lack of comment by an SEC official is absurd. A plain and clear reading of the statements shows that they were factual and defamatory, and are actionable statements.

McGraw-Hill's statements were based on defamatory assumptions and/or undisclosed information that Schuler "hid" her identity and the prior consent decree from the SEC when, in fact, a competent investigation of this issue would have revealed that the SEC was aware of Schuler's two names and of her

signature on both consent decrees. A plain reading of the article supports this interpretation of the statements.

McGraw-Hill's claim that such statements are not "of and concerning" Schuler, is misleading. When viewed in context, the statements clearly indicate that Schuler deceived the SEC and/or refused to clear up any misunderstanding by the SEC. Therefore, the statements are "of and concerning" Schuler and form the basis of her defamation claims. In contrast to McGraw-Hill's assertions, the above statements actively encouraged readers to infer that Schuler's sex change either served to or was intended to camouflage her past misdeeds. As such, the statements were defamatory and are actionable. See Moore v. Sun Publishing Corp., 118 N.M. 375, 381, 881 P.2d 735, 741 (Ct. App.), cert. denied, 118 N.M. 430, 882 P.2d 21 (1994). The district court erred in dismissing Schuler's claims on this point and its erroneous ruling should be reversed on appeal.

f. "But she didn't like to talk about that." Aplt. App., 144, column 1, ¶ 3.

In contrast to McGraw-Hill's assertions, the above statement was defamatory. It was false, it concerned Schuler, reasonable people would understand it to be defamatory when read in context, and it caused serious harm to Schuler's reputation. Aplt. Brief in Chief, 11 ¶ 2(a), 14-15 ¶ f. In this context, the statement rendered Schuler ridiculous and subject to public contempt by attributing to her deceptive and inconsistent behavior. On the one hand, the article went to great lengths to emphasize the extent of her prior work with the FBI. Aplt. App., 144, column 1,145, column 3. Then article then misled readers to believe that Schuler was secretive and was not forthcoming about this work. This statement was included in

the article because it served McGraw-Hill's interest in painting Schuler as a deceitful, evasive corporate executive who was not to be trusted. The district court erred finding otherwise.

h. **"there was a stain on her record. She had twice been sued in Federal Court by the SEC, twice agreeing to injunctions, without admitting or denying guilt, that prohibited her from violating the securities laws. One of the injunctions was known to the Amex when it approved Printron's listing on the ECM. The other was not."** Aplt. App, 144, column 2, ¶ 1.

As noted in Schuler's Brief in Chief, the above statements defamed Schuler by implying that she deceived the Amex by her sex change. The above statements, when read in context, again led readers to believe that Schuler either actively deceived the Amex by violating some duty to disclose her past or that she failed to clear up some misunderstanding by Amex. Either interpretation of the statements is reasonable and defamatory to Schuler. McGraw-Hill's argument that the statement does not concern Schuler must fail, since the surrounding circumstances show that the statement focused on her candor with the Amex. See Andrews v. Stalllings, 119 N.M. 478, 495, 892 P.2d 611, 628 (Ct. App. 1995) (J. Hartz, specially concurring).

Further, the article implied that McGraw-Hill had undisclosed facts, which supported its premise that Schuler actively or passively intended to and in fact, did deceive the Amex. Under these circumstances, the statements were

defamatory and Schuler's claims should be reinstated on appeal.

i. **"Eleanor Schuler had two records of alleged securities law transgressions-one as a woman, and one as a man. In fact, the name `Eleanor Schuler' was one that she had made up out of thin air."** Aplt. App., 144, column 2, ¶ 2.

A central issue in the subject article, was Schuler's candor with the SEC with regard to her past and her sex change. The statement that Schuler had "two records of alleged securities law transgressions-one as a woman, and one as a man" misled readers to conclude that Schuler failed to properly identify herself to the SEC or to clear up any confusion regarding her identity. The inclusion of this statement in the article exemplifies McGraw-Hill's plan to further tarnish Schuler's reputation, for its own ends; namely, selling sensationalized tabloid journalism to the public.

When the first statement, coupled with the statement that Schuler "made up" her name, led readers to conclude that Schuler's name was chosen in a further effort to deceive the SEC and others. Viewed in context, the statements defamed Schuler. A name is not "made up" merely because it does not resemble a previous name. In this context, use of the term "made up" created a definite negative impression of Schuler in the minds of readers and virtually forced them to conclude, as McGraw-Hill intended, that Schuler was deceptive in business dealings. Thus, the statements were defamatory and the district court's ruling should be reversed on appeal.

k. **"Her earlier SEC record, and her change in gender were concealed by Printron not only from Barnes but from the Amex' `blue ribbon' panel of Wall Street notables that had handpicked the 23 ECM companies. Schuler also hid her previous identity, and the injunction, from securities regulators in New [Y]ork, in a `sunshine law' filing 14 months before the day the balloons fell on the Amex floor (box)."** Aplt. App., 128, 145, column 2, ¶ 2-column 3, ¶ 1.

For reasons stated in Schuler's Brief in Chief, the evidence shows that the first statement was "of and concerning" Schuler due to her prominent position and identity with the corporation. Further, the statement falsely implied that Schuler had some duty disclose her prior medical history and identity to corporate contacts, when in fact, no such duty existed. 17 C.F.R. 11 § 229.401(e) and (f).

The word "conceal" means to hide, keep secret, or to "prevent or avoid disclosing or divulging." Random House College Dictionary 277 (Rev. ed. 1988). That word had a distinct and negative meaning in this context. It is an issue of fact, capable of being proven or disproven, whether Schuler "hid" her past identity from her business associates. Corporate references to her past work experience listing her name as "Eleanor Schuler" do not constitute deception or "concealment" on Schuler's part. McGraw-Hill wrongfully wrote its article in such a manner that its readers would be forced to accept its conclusion that Schuler hid her identity. For, if she did not hide her identity, the article's premise would fail. The statement,

taken in context, defamed Schuler and is actionable.

With regard to the statement that Schuler herself "hid" her prior identity, a fair and reasonable reading of the information contained in the "box" featuring the New York Sunshine Law filing is that the subject question refered to names used while a corporate representative or to names used while filing under New York's Sunshine Law. Aplt. App., 145, columns 1 and 3, highlighted box. The filing obviously was to be used for New York's reference and access. As noted above, McGraw-Hill took pains to portray the filing in a manner which supported its mission to destroy Schuler's reputation. Schuler's true candor with New York securities personnel is a matter which can be proven or disproven at trial. McGraw-Hill's statement was defamatory to Schuler and was meant to support the article's premise of portraying Schuler as deceptive and untruthful. The trial court erred by ruling otherwise.

n. **"Schuler/Huminik affair[]"** Aplt. App., 128, 145, column 1, ¶ 1.

ac. **"the next Huminik/Schuler exploit"** Aplt. App., 129, 146, column, 1, ¶ 4.

ai. **"Huminik/Schuler matter"** Aplt. App., 130, 146, column 3, ¶ 2.

The above statements, were not shorthand references, but active statements which, when viewed in context, support McGraw-Hill's defamatory portrayal of Schuler as a deceptive person who sought to hide her past and thereby defraud her business contacts. Such images of Schuler were not true and defamed her in this context.

s. **"As recounted in his slickly written 1967 book[]"** Aplt. App., 128, 145,

column 3, ¶ 4.

When read in the context of McGraw-Hill's article, the statement that Schuler book's was "slickly written" clearly implied that Schuler was a "slippery character" who deceived her business and other associates. Schuler's interpretation of the statement is not speculative, but rather, is reasonable and viable given the context of the statement. Further, in context, the statement was not an opinion. When viewed in the context of the whole article, a reasonable reader would understand the statement to be one of many facts supporting McGraw-Hill's effort to defame Schuler.

The whole premise of McGraw-Hill's article is that Schuler somehow "hid" her true identity to mask wrongdoing. A fair reading of the article, reveals McGraw-Hill was determined to impugn Schuler's reputation for its own ends. This statement furthered that purpose by leaving the reader with a clear, and false, picture of Schuler as a deceptive business person. Thus, it was defamatory and is actionable.

t. **"Neither the book nor the double agent career were mentioned in any of Printron's filings with investors and regulators."** Aplt. App., 128-29, 145, column 3, ¶ 5.

As noted in Schuler's Brief in Chief, there was no duty to disclose such information and McGraw-Hill's statement clearly encouraged readers to believe that there was some "moral" or other duty, if not a duty required by the SEC. Brief in Chief, § 2(b)(t), p. 20. Far from "dispelling" that implication, McGraw-Hill's later statement that the SEC rules permit such non-disclosure, only served to reinforce to readers that Schuler

violated a "moral" or other duty to her business and other associates. Aplt. App. 145, col. 3.

McGraw-Hill's discussion of legal opinions does not change the nature of the statement. As noted above, McGraw-Hill clearly implied that Schuler violated "some duty" to her business associates, when the statement was not true and can be proven as a fact at trial. Likewise, the accuracy and acceptability of descriptions of Schuler's business accomplishments between 1966 and 1991, included on corporate disclosure documents, are matters susceptible of proof at trial.

McGraw-Hill's citation to Bertoglio v. Texas Int'l Co., 488 F. Supp. 630 (D. Del. 1980) does not support its statements that Schuler's disclosures were not adequate. In Bertoglio the court determined that, under the specific facts of that case, a prior consent decree should have been revealed where it was the first in a long series of security law violations. Id. at 661. The court further concluded that the SEC's five (5) year disclosure rule regarding business experience was warranted by the view that older items are irrelevant "ancient history." Id. at 661. "This is particularly true where a ten or fifteen-year old incident mars an otherwise unblemished record." Id. Schuler's case is factually distinct from Bertoglio in that she has been associated with only two consent decrees which are separated by fifteen (15) years. Aplt. App., 185, 207-209. Thus, Schuler's situation clearly falls within that category of cases in which a "fifteen-year old incident mars [her otherwise perfect] record." Bertoglio, 488 F. Supp. at 661. The remaining cases cited by McGraw-Hill are not applicable to this case, since Schuler has no past fraud conviction or registration revocation.

McGraw-Hill attempts to divert the Court's attention to side issues such as the applicability of all possible statutes

regarding corporate disclosure, when the five (5) year limit discussed above applies. 17 C.F.R. 11 §§ 229.401(e) and (f). The important factor in this case, is the overall content, tone, and presentation of the article, including its attempt to hold Schuler to disclosure standards which no other person is expected to meet. When read in that light, the statement's implication was false and Schuler's claims should be reinstated on appeal.

u. **"[']We have nothing against transsexuals[']"** Aplt. App., 129, 146, column 1, ¶ 1.

When read in the context of the entire article, the above statement encourages readers to hold Schuler in contempt and to view her as deceptive. Taken with the other items in the article, the statement is adequate to support Schuler's defamation claims.

v. **"At issue is not her sex change, but rather the extent to which her concealment of that change masked other things."** Aplt. App., 129, 146, column 1, ¶ 1.

As noted with regard to statement k above, this statement, when viewed in context, is fairly read to paint Schuler as deceptive in business dealings. The word "conceal" has a false, and negative meaning in this context and was defamatory. Thus, the district court's ruling should be reversed.

w. **"The trouble . . . arises whenever Schuler's pre-Schuler activities are mentioned in Printron's public**

> **disclosures. Time after time, they refer to Schuler as a `she'- even when discussing positions held when Schuler was a `he.'"** Aplt. App., 129, 146, column 1, ¶ 2.

McGraw-Hill's statement was a characterization of its alleged "Barnes perspective." No quote marks appear around that statement, indicating that the words are not a direct quote. Aplt. App. 143, col 1. At this stage of proceedings, Schuler has no way of knowing, before discovery, whether the information for this statement came from Barnes and, if so, whether it was accurately written, nor can she know whether the statement was manufactured or misconstrued by McGraw-Hill. A fair reading of the statements supports the view that they were defamatory to Schuler. The trial court erred finding otherwise.

z. **"Was Schuler being shy-or was she improperly misleading investors?"** Aplt. App., 129, 146, column 1, ¶ 4.

As noted in Schuler's Brief in Chief, this statement of fact, taken in context is reasonably interpreted as falsely implying that Schuler misled investors and implies that still undisclosed facts, including business associates, would support its premise. When viewed in context, the statement was defamatory and supports Schuler's claims.

ad. **"John Huminik was no longer exhibiting a James Bond persona. `Marine blue shadow haloes the eyelids,' . . . The <u>Post</u> went on to describe the sex change and, in graphic detail . . . None of this would**

> **amount to a hill of beans if Eleanor Schuler, as Printron CEO, hadn't fallen afoul of the SEC."** Aplt. App., 129-30, 146, column 1, ¶ 5.

Despite McGraw-Hill's argument to the contrary, the above statement "as Printron CEO," Schuler "f[e]ll afoul of the SEC" was false and misled reasonable readers to believe that Schuler acted wrongfully while a Printron CEO. This statement was highly defamatory to Schuler and supports her claims.

> ae. **"The Huber-Schuler ties were shrugged off by the blue-ribbon panel. `We were assured by the Amex staff that the issue had been resolved[.]'"** Aplt. App., 130, 146, column 2, ¶ 2 - column 3, ¶ 1.

McGraw-Hill's above statement falsely implied that Huber and Schuler were actively involved in a concerted effort to deceive investors or others. The word "tie" includes a bond, attachment, or joining together. Random House College Dictionary 1373 (Rev. ed. 1988). McGraw-Hill's interpretation of the statement is strained and goes against the plain meaning of the word. If McGraw-Hill had meant to say that Huber and Schuler were co-workers, or that Huber brought Schuler into the company it could have done so. Instead, it chose to use words which led readers to believe that Schuler was as deceptive and dishonest as Huber. Thus, the statement, taken in context, supports Schuler's claims and the district court's ruling should be reversed on appeal.

> af. **"But Hamarat and another former panel member[] . . . now say that the**

> **panel didn't know that Eleanor Schuler used to be John Huminik-or that Schuler consented to not one but two injunctions by the SEC. If they had known, they say, Printron's listing would never have been approved."** Aplt. App., 130, 146, column 3, ¶ 1.

A statement which implies that it is based on undisclosed facts is a statement of fact. N.M. UJI § 13-1004. The above statement falsely implied that Schuler misled the entire "blue ribbon panel," and further implied that it had undisclosed information to that effect. In fact, Schuler's identity was known to the SEC and was available to panel members for their review. As for the quote's accuracy, Schuler can verify that information only with proper discovery. As such, the statement supports Schuler's claims.

> ag. **"The SEC's mild treatment of Schuler in 1991 raises yet another issue: Did the SEC know in 1991 that Schuler was Huminik?"** Aplt. App., 130, 146, column 3, ¶ 2.

The first statement when coupled with the following inquiry, does not let the reader "make the call" as McGraw-Hill suggests. Instead, it actively and cleverly leads the reader to believe, falsely, that Schuler's prior identity was not known to the SEC or the panel because Schuler "hid" that information from them. Further, the characterization of Schuler as receiving "mild" treatment, leads the reader to believe that Schuler somehow escaped justice by virtue of her sex change. As noted, the SEC was fully aware that Schuler signed the subject consent

decrees as "Eleanor Schuler" and should be charged with that knowledge. Posing inquiries about the SEC's knowledge of Schuler's identity in this manner, with knowledge of Schuler's signatures, was irresponsible and defamatory in this context. The statement was not opinion and an ordinary reader would interpret the statement as one of fact; namely, that the SEC treated Schuler "mildly" because it was deceived by her concealment of her prior identity. Thus, the statement fully is actionable by Schuler.

ah. **"One explanation might be that the SEC felt so much time had passed that it would not pursue a criminal contempt action against Schuler."** Aplt. App., 130, 146, column 3, ¶ 2.

As noted in the section directly above, this statement by McGraw-Hill improperly led readers to conclude that Schuler's prior identity was not known to the SEC and that if it had been known, Schuler likely would have been subjected to criminal sanctions. An ordinary reader would interpret this statement as one of fact indicating that Schuler's deception of the SEC allowed her to escape justice. Particularly in the context of a purported "investigation" section where the article was placed. Aplt. App., 144.

The discussion of allegedly "normal" treatment of contempt suspects, merely reinforced the readers' view that Schuler was deceptive and escaped justice when, in fact, Schuler has no criminal record and never has been arrested. The discovery process would reveal the consent decrees to be most minor in nature; ranking with automobile parking tickets. Would Business Week have reported that a corporate officer's ancient parking tickets should have been disclosed in a prospectus? In this context, the statement reasonably is viewed

as one of fact. As such, it was false and defamatory, and is actionable by Schuler.

ak. **"But they are listed as two separate people, with one `incident' to his name and one to hers."** Aplt. App., 130, 146, column 3, ¶ 3.

As noted in Schuler's Brief in Chief, the above statement encouraged readers to conclude that Schuler deceived the SEC and other business associates. Brief in Chief, § VI,B,2(b),(ak), p. 25. The statement "concerns" Schuler's current and prior identity as disclosed to the SEC and others, and thus, concerns Schuler. When read in context, this statement solidified in readers' minds the false image of Schuler as deceptive. Thus, such statement is defamatory and supports Schuler's claims.

The above statements, when read in context, clearly encouraged the article's readers to conclude that Schuler was deceptive with the SEC and other, that she escaped justice, and that she still would be actively deceiving her business contacts, if not for McGraw-Hill's exposure of her tactics. McGraw-Hill carefully chose the above statements and the tone and substance of the article in a manner calculated markedly to increase its profit and to sensationalize the situation discussed so as to sell its magazines. It chose to do that by causing the greatest harm to Schuler, the person with the most to lose and least ability to fight back. A fair and impartial reading of the article reveals that McGraw-Hill purposefully decimated Schuler's most precious asset, her reputation. The trial court erred in dismissing Schuler's claims and its ruling should be reversed on appeal.

VII. SCHULER STATED A VALID CLAIM FOR FALSE LIGHT INVASION OF PRIVACY

Schuler has demonstrated that the subject statements referenced, but not discussed in this context by McGraw-Hill, are statements of fact which can and do form the basis of Schuler's claims for both defamation and false light invasion of privacy. Appellant's Brief in Chief, § VI,B,3, pp. 25-34. The photograph, item a., in the context of this article encouraged readers to believe that Schuler was not a professional businesswoman, when in fact the opposite was true. The false statement of fact included McGraw-Hill's depiction of Schuler in a social setting and social attire, as opposed to a business setting with business attire. One need only look to both sides of Schuler's photograph in the magazine's index to see that she is singled out for ridicule. Aplt. App. 127, 143, col. 2. That depiction of Schuler was highly offensive to an ordinary reader. One must be mindful of the context of this article and its target audience. The four (4) page article appears in a business magazine directed to business persons who deal with the SEC, the Amex, and with investors. Schuler's business associates were drawn from the same type of audience. The photograph portrayed Schuler as a "social" or "casual" type of person in business dealings; as someone who was not professional or trustworthy. That image was highly offensive and highly damaging to Schuler's reputation.

Also, McGraw-Hill's statements regarding Printron's regulatory filings describing Schuler as "self employed" between 1966 and 1991, when she was president of two companies which allegedly defrauded investors, were false and misleading. Aplt. App., 129, 146, column 1, ¶¶ 2-3. A fair reading of the article leads an ordinary reader to believe that the descriptions are mutually exclusive and that the Schuler "lied" or "hid" her

association with the two subject companies. This statement is false. Schuler neither lied nor hid her prior identity and McGraw-Hill's statement to the contrary certainly is actionable.

VIII. SCHULER STATED A VALID CLAIM FOR PUBLICATION OF PRIVATE FACTS INVASION OF PRIVACY

While Schuler's medical history was revealed in the 1970s, it was not the proper subject of a purported "business article" like that published by McGraw-Hill. McGraw-Hill's article focused on Schuler's medical history and her sex change merely to sell magazines and to sensationalize its article to increase profits. Aplt. App., 143-153.

Remember the article's title "did the Amex Turn a Blind Eye to a 'Showcase Stock?" Aplt. App., 144. The article purported to be about the activities of Amex with regard to stocks. It was not supposed to be about Schuler, sex changes or spys. Yet, a clear and reasonable reading of the article shows that it has very little to do with the Amex. As noted in Schuler's Brief in Chief, the article included over twenty (20) references to Schuler's sex, gender, and sex and name change. Brief in Chief, § VI,B,4(b), p. 34; Aplt. App., 127-130, 143-153. Another ten (10) or so statements in the article emphasize "he" versus "she" aspects of Schuler's past. Aplt. App., 127-130, 143-153.

Schuler's sex change, though not concealed, was not flaunted to all persons with whom she came in contact. The sex change was ancient history at the time of this article and Schuler had been living as a woman for over two decades. While, the exact point in time which one again becomes a private figure has not been determined, for purposes of this appeal Schuler is

entitled to be regarded as a private figure, as she has alleged. See Wolston v. Reader's Digest Ass'n Inc., 443 U.S. 157, 166 n.7 (1979).

At the time of this article, the newsworthiness of Schuler's sex change was virtually non-existent due to the passage of over fifteen (15) years. Schuler's sex change had no bearing on her ability to function as a Printron CEO, a businesswoman, or to relate to the Amex and SEC. Her situation and background were unique, and McGraw-Hill was determined to sensationalize that background for its own ends, regardless of the aftermath which resulted. Thus, the subject was not proper fare for the article's focus and forms the basis of Schuler's claims.

Under the circumstances of this case, it would be unreasonable to deem Schuler a public figure, particularly when that issue is not directly before the Court for review and when no discovery has occurred. Schuler denies that she initially revealed her sex change. McGraw-Hill's argument that she did, is not supported by any evidence, and amounts to mere wishful thinking on its part. Its statement cannot serve as the basis of any characterization of Schuler's status as public or private. Thus, the facts revealed about Schuler in this article were actionable and the district court's ruling should be reversed.

IX. SCHULER STATED A VALID CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

McGraw-Hill's article did not fairly or accurately depict the events discussed or Schuler's business relationships or dealings. Instead, the article stated as a fact that Schuler was deceptive in her business dealings. The appearance of the article

in a magazine targeted to persons of the type with whom Schuler would do business was reasonably calculated to irreparably injure her reputation. Such conduct constitutes the type of outrageous conduct actionable by this tort. As noted, above Schuler must be deemed a private figure for purposes of this appeal and McGraw-Hill's discussion of "malice" cases is not applicable to this case. Since the days of Oliver Wendell Holmes, malice in its ordinary sense is an element to be decided by a jury. See N.M. UJI §§ 13-1002, 13-1011 (1997). The district court erred in dismissing Schuler's claims on this point.

X. SCHULER STATED A VALID CLAIM FOR INTERFERENCE WITH CONTRACTUAL RELATIONS/PROSPECTIVE ADVANTAGE

Schuler has shown that McGraw-Hill tortiously interfered with her current and potential business relationships by intentionally or recklessly making false and defamatory statements about her, with improper means or motive. So thorough was McGraw-Hill's smear campaign, that Schuler was forced to resign her position with Printron and to file bankruptcy; a decidedly unpleasant set of circumstances. The full extent of McGraw-Hill's motives can be explored in the context of discovery and other future proceedings in this case. The only issue here is whether Schuler has stated a valid claim on this point. Schuler is not required to prove her claim at this stage of proceedings as McGraw-Hill suggests.

A fair reading of the entire article shows that it encouraged readers to believe that Schuler essentially duped her business associates. The emphasis of the article, impugning Schuler's character and integrity, was improper and served McGraw-Hill's own interests. Schuler has sufficiently stated a cause of action on this point and the district court's ruling

should be reversed on appeal.

VII. CONCLUSION

Schuler's reputation is the focus of this action and the present appeal. When reading the article, in context, an ordinary reader comes away with a false impression of Schuler as a deceptive person who hid her past to avoid justice. The article's obsession with Schuler's sex change also encourages readers to invoke any innate biases against persons who are biologically wounded.

The law is not meant only for the strong and powerful, it also protects the weak and those in need of help to redress wrongs done to them. Likewise, the law does not protect only the press. Much to McGraw-Hill's dismay, the law places an equal emphasis on protecting the reputations of each of its citizens.

At this stage of proceedings, the sufficiency of the claims themselves are at issue, not the proof of those claims. When viewed in that light, it is evident that Schuler has met her burden of alleging viable causes of action on all points and her claims should be reinstated and the district court's ruling overturned on appeal. The trial court's decision of Schuler's case at this stage of the proceedings was premature since Schuler was not granted even the opportunity of discovering or examining the thoughts, editorial processes, and other information exclusively controlled by McGraw-Hill. See Marchiondo v. Brown, 98 N.M. 292, 297, 649 P.2d 462, 467 (1982).

The Federal Rules of Civil Procedure continue to rely on constitutionally mandated jury trials to resolve disputes. Fed. R. Civ. Pro. 38-53. See also U.S. Const. amend. VII. Judges

cannot unilaterally decide issues for the jury. The constitution does not say that the right to a jury trial is preserved except when a judge wants to try a case himself, presumably in the shadows of his chambers. In this matter, the Tenth Circuit Court should remand the case for a jury trial. Prejudice can be highly infective when transmitted by a judge to a jury of ordinary citizens. The Tenth Circuit Court also should ask itself, why the district court's Memorandum Opinion and Order and Order of Dismissal, entered June 11, 1997, should not disappear altogether, and leave no trace? See Aplt. App., 225-251.

WHEREFORE, for the foregoing reasons, Schuler respectfully requests that the Court enter an Order reversing the District Court's grant of McGraw-Hill's Motion to Dismiss and mandating that the trial court present this case to a jury for a decision on the merits. Also, Schuler requests that the Court grant her attorney fees, costs, and such other relief the Court deems proper.

STATEMENT REGARDING ORAL ARGUMENT

Schuler requests oral argument, as it is essential to a clear understanding of the case and what it is about. Schuler should have the opportunity to be seen and heard by the panel to develop a better understanding of the issues in this case and the devastating impact of the article.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to all those entitled to notice this 27th day of October, 1997.

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